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THE UNITED STATES SUPREME COURT AND DESEGREGATION

THE AFTERMATH OF *BROWN* v. *TOPEKA*

More than six years have passed since the United States Supreme Court announced its historic decision declaring segregation of races in public education unconstitutional. The ruling, which upset a long-established pattern of community life in large areas of the United States, created a controversy which is still raging with unabated force. The Supreme Court became the primary target of those bent on continuing the pattern of racial segregation in the South, the hostile reaction ranging from academic protests to open defiance.[1] This article, taking the ruling of 1954 as the starting point, examines the extent to which it has been strengthened, weakened or otherwise modified by subsequent decisions.

The First Brown Decision

On May 17, 1954, Chief Justice Earl Warren delivered for a unanimous court the opinion in *Brown* v. *Board of Education of Topeka*.[2] Plaintiffs in the four cases covered by the opinion were Negro children of elementary and secondary (high) school age, who sought the aid of the courts in obtaining admission to public schools reserved for white pupils under the segregation legislation of the states involved.[3] The issue was the constitutional validity of the

[1] See Freund, " Storm Over the American Supreme Court," 21 M.L.R. 345.

[2] 347 U.S. 483. The case, which gave the decision the name, originated in Kansas. Three other cases covered by the opinion involved racial segregation in public schools in Delaware, Virginia and South Carolina. All four cases are often referred to as the *School Segregation Cases*.

[3] Each action was a " class action," the plaintiffs suing for themselves " and on behalf of persons similarly situated," meaning other Negro pupils seeking admission to " white " schools in the defending school district. This is reflected in the conclusion of the Supreme Court: see below, note 6. Class actions are permitted under federal practice. However, it is not quite clear whether in the instant type of class actions the *res judicata* effect extends to persons who did not participate in the suit. See note in 1 *Race Relations Law Reporter*, 991 *et seq.*

"separate but equal" doctrine as applied in public education. This doctrine holds that equality of treatment as required of the states and state agencies by the Equal Protection Clause of the Fourteenth Amendment[4] is accorded when Negroes are provided "substantially equal" facilities with those granted to whites, even though these facilities be separate for both races. The doctrine was adopted by the Supreme Court in 1896 in *Plessy* v. *Ferguson*[5] which did not involve racial segregation in education, but in transportation. As the opinion in the *Brown* case states, the question whether the doctrine of "separate but equal" can be reconciled with the guarantee of equal protection ought not to be decided in terms of the situation in 1868 when the Fourteenth Amendment was adopted, or in 1896 when *Plessy* v. *Ferguson* was decided, but should be considered in the light of the role public education plays in American life today. The crucial question is asked and answered:

> Does segregation of children in public schools, solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority groups of equal educational facilities? We believe that it does . . . To separate [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

The court's conclusion is that

> in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the action has been brought[6] are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[7]

In view of the "problems of considerable complexity" which the formulation of decrees carrying out the decision presented, the Chief Justice announced that the court would hear further argument on

[4] ". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

[5] 163 U.S. 537.

[6] See above, note 3.

[7] In a companion decision, *Bolling* v. *Sharpe*, 347 U.S. 497, the Supreme Court struck down racial segregation in public education in the District of Columbia, which is federal, not state, territory. Instead of the Equal Protection Clause of the Fourteenth Amendment, which does not bind federal authorities, the court used as a basis of its holding in *Bolling* v. *Sharpe* the Due Process Clause of the Fifth Amendment, under which a federal authority may not deprive a person "of life, liberty, or property, without due process of law." The court stated that "(s)egregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."

what specific relief plaintiffs should be granted. The Attorneys-General of the states requiring or permitting segregation in public education were invited to submit their views.

THE SECOND BROWN DECISION

One year later, on May 31, 1955, Chief Justice Warren announced the opinion of the court, again unanimous, on the implementation of the anti-segregation ruling. The second *Brown* opinion [8] incorporated by reference the opinions of May 17, 1954,[9] "declaring the fundamental principle that racial discrimination in public education is unconstitutional," and stated that "(a)ll provisions of federal, state, or local law must yield to this principle." Primary responsibility for the implementation of the court's decision was placed on the public school authorities, while the local courts were assigned the duty to consider "whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." In this function of supervising the school authorities, the courts were to be guided "by equitable principles." The opinion explained this as follows:

> Traditionally, equity has been characterised by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs . . . At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

The local courts were instructed, "while giving weight to these public and private considerations" to require that the school authorities involved "make a prompt and reasonable start toward full compliance" with the 1954 ruling. Should the school authorities, after such start is made, require additional time for full compliance, they must establish that this is necessary "in the public interest and consistent with good faith compliance at the earliest practicable date." The opinion listed problems relevant to the consideration of the time needed for full transition to a racially nondiscriminatory school system, such as the physical conditions of the school plant, the school transportation system, personnel, revision of school districts, etc.

[8] *Brown* v. *Board of Education of Topeka*, 349 U.S. 294.
[9] Including that handed down in *Bolling* v. *Sharpe*; see above, note 7.

The court reversed the judgments appealed from [10] and remanded the cases to the federal district courts to enter such orders and decrees " as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed [11] the parties to these cases."

In terms of *res judicata*, the second *Brown* decision applies to the school districts which were defendants in the cases before the court. However, it is clear that its importance, like that of the first *Brown* decision, goes far beyond settling a dispute between the parties to the suits. The opinion granting relief was meant to provide a blueprint for the orderly transition from racially segregated schools wherever they existed [12] to schools open to pupils without regard to colour or race.

An important feature of this plan is the gradual implementation of the first *Brown* decision declaring segregation unconstitutional. As noted above, the Supreme Court relied on " equitable principles " on authorising this step-by-step approach. No doubt, the cases before the Supreme Court in the segregation controversy were equity cases, since all plaintiffs applied for injunctions. Hence, the court had at its disposal the broad discretionary powers granted to courts of equity. What is novel is that the enjoyment of clear constitutional rights of individuals may be delayed through the operation of equitable principles.[13] That the right to be free from discrimination is one that requires immediate implementation follows from Supreme Court decisions rendered between 1938 and 1950 in suits brought by Negroes who, because of their race, were refused admission to state-supported graduate schools. Finding that plaintiffs had been denied the equal protection of the laws,[14] the court stressed the " personal and present " nature of their constitutional rights, and accordingly required the graduate schools to provide facilities for the Negro students suing for relief, as soon as they did for applicants of the white race.[15] In these cases the immediate implementation did not present administrative problems; it involved nothing more than the admission of one person—the

[10] Except in the Delaware case where the highest state court had required admission of the Negro pupils—the plaintiffs—to a " white " school and the school district had sought review by the Supreme Court.

[11] As to the origin of this phrase, see Freund, *loc. cit.*, p. 351 (" a phrase taken from the English Chancery practice "). But see Greenberg, *Race Relations and American Law*, 1959, p. 216.

[12] In the school year 1959–60, 3,039,133 Negro and 9,901,310 white pupils were enrolled in the seventeen states and the District of Columbia which until 1954 had required racial segregation in all their public schools. *Southern School News*, April, 1960.

[13] Note in 64 *Yale Law Journal* 126. The delay may be considerable. See for example below at note 90.

[14] In these cases the court found actual inequality between the educational facilities desired and the segregated facilities offered so that there was no need to examine the validity of the " separate but equal " doctrine.

[15] *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Sipuel* v. *Oklahoma*, 332 U.S. 631 (1948); see also *Missouri* v. *Canada*, 305 U.S. 337 (1938), and *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950).

plaintiff in each suit; furthermore, it was clear that the number of future qualified Negro claimants for admission to graduate schools would be limited.

In contrast, it was obvious that the process of desegregation of public elementary and high schools as required under the first *Brown* opinion would be an operation of gigantic proportions.[16] In the year between the first *Brown* opinion affirming the constitutional right of the Negro pupil to equal protection of the laws, and the implementing decision, the tremendous difficulties of uprooting an old-established way of life in a large area of the United States became all too clear. Hence, to soften the impact of the ruling, the Supreme Court developed in the second *Brown* decision the concept of gradualism justified by the principle of flexibility governing the shaping of remedies in equity. The result was that the right of the individual Negro elementary or high school pupil to immediate vindication of his "personal and present" constitutional right had to be subordinated to the interest of the whole community in a smooth and orderly transition to desegregated schools.

The conflict between the two approaches became apparent in a case in which both the earlier opinions dealing with admission to graduate schools and the opinions in the *School Segregation Cases* could be used as precedents. Florida state courts had dismissed an action by a Negro seeking admission to the College of Law of the University of Florida. One week after the first *Brown* decision, the U.S. Supreme Court vacated the judgment of the state court and remanded the case "for consideration in the light of the Segregation Cases . . . and conditions that now prevail."[17] On remand, the Florida Supreme Court, in a decision rendered after the second *Brown* opinion, adopted the gradual implementation procedure set forth in that decision, deferring for an indefinite period plaintiff's admission to law school.[18] The case was brought again to the U.S. Supreme Court, which in a *per curiam* decision[19] stated that by referring in its previous decision to the *School Segregation Cases*, it "did not imply that decrees involving graduate study present the problems of public elementary and secondary

[16] In spring 1960 the picture was this: In the district of Columbia and in West Virginia desegregation had been completed. In the border states of Delaware, Kentucky, Maryland, Missouri and Oklahoma desegregation was in progress. Partial desegregation had been achieved in Texas. Sporadic or token desegregation existed in Arkansas, Florida, North Carolina, Tennessee and Virginia. In Alabama, Georgia, Louisiana, Mississippi and South Carolina complete segregation of races continued. In the area covered by these 17 states and the District of Columbia as a whole, 6 per cent. of the Negroes enrolled in public schools attended classes with white pupils: *Southern School News*, April 1959. It should be borne in mind that even in the absence of measures aimed at maintaining school segregation, a certain degree of separation of whites and Negroes in public education will result from residential segregation. See Report of the U.S. Commission on Civil Rights, 1959, p. 389.

[17] *Florida ex rel. Hawkins* v. *Bd. of Control*, 347 U.S. 971.

[18] 83 So. 2d 20.

[19] 350 U.S. 413.

schools." The court replaced its previous order—which had been misconstrued—by a new one which, although again based on the authority of the *School Segregation Cases*, stressed that " as this case involves the admission of a Negro to a graduate professional school, there is no reason for delay." In ordering his " prompt admission " the court cited its decision on admission to graduate schools.[20]

It follows that a qualified Negro who seeks admission to an institution of higher learning [21] is entitled to immediate relief, while in the case of a Negro pupil who wants to attend an unsegregated elementary or high school, relief may be delayed for a considerable period, depending on conditions, possibly for years.[22] This differentiation can be justified by considerations of practicability. However, it is hardly satisfactory if viewed in terms of legal doctrine. If a Negro student has a " personal and present " constitutional right to be admitted to a university without discrimination, it is difficult to see why in the case of elementary or high school pupils this right should not be the same.

The Girard Case

The guarantee of equal protection of the laws set forth in the Fourteenth Amendment is a guarantee against discrimination by " state action," [23] meaning action by the state or a state agency, including local school boards. This has been a " firmly embedded " constitutional principle since the *Civil Rights Cases* of 1883.[24] " That amendment erects no shield against merely private conduct, however discriminatory or wrongful." [25] This explains why the decisions in the School Segregation Cases prohibit only segregation in public schools. Private schools are free to discriminate [26] although state laws *requiring* segregation in private schools would

[20] See above, note 15. Subsequently the Florida Supreme Court refused again to order plaintiff's prompt admission on the ground that his admission might disrupt the university system and lead to violence. This time, the U.S. Supreme Court refused review (355 U.S. 839) suggesting that plaintiff seek relief in the appropriate federal district court. The court seems to prefer to exercise appellate control over lower federal courts than over the highest state courts. See Greenberg, *loc. cit.*, p. 264, note 201.

[21] The right to immediate relief originally announced in cases involving admission to graduate schools seems to apply also to students seeking admission to undergraduate university courses. See *Lucy* v. *Adams*, 350 U.S. 1 (1955).

[22] Which in the case of many pupils will be tantamount to a denial of unsegregated education.

[23] " . . . nor shall *any* State . . . deny . . . (emphasis added). See above, note 4.

[24] 109 U.S. 3. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). On the tendency to expand the concept of state action, see Greenberg, *loc. cit.*, p. 46 *et seq.*, Miller, " Racial Discrimination and Private Schools," 41 *Minnesota Law Review*, p. 145 *et seq.*, p. 245 *et seq.*

[25] *Shelley* v. *Kraemer*, *supra*, at p. 13.

[26] Unless prohibited from doing so by state law, as, *e.g.*, by the fair educational practices laws enacted in some Northern states; see Emerson and Haber, *Political and Civil Rights in the United States* (2nd ed., 1958), p. 1340.

appear to be discriminatory state action and void, like other laws requiring segregation.[27]

In 1957 the Supreme Court was faced with the question whether discrimination in a public school operated under a charitable trust falls under the *Brown* rule if the trustee is a state agency. Under the will of Stephen Girard setting up the trust in question, the institution was created for "poor white male orphans." The will named the City of Philadelphia as trustee; later a Board of Directors of City Trusts, another city agency, was substituted. Two Negroes were denied admission to Girard College because they did not meet the qualification required by Mr. Girard. Their action to force the Board to admit them was dismissed by Pennsylvania courts on the ground that the trust was set up by a private individual who was free to dispose of his property as he saw fit, and that the city agency administering the trust did not act in a governmental, nor even in a proprietary, capacity,[28] but merely in a fiduciary capacity.[29] The U.S. Supreme Court reversed on the ground that the Board operating the College was an agency of the state, even though acting as trustee, and, therefore, its refusal to admit the Negro boys was discrimination prohibited by the Fourteenth Amendment.[30] The subsequent history of the case is of interest. To comply with the Supreme Court's ruling, the local court could either admit the Negro plaintiffs or replace the Board of Directors of City Trusts by private individuals as trustees. The court chose the latter course. The Pennsylvania Supreme Court affirmed on the ground that under established trust principles it is proper to remove a trustee who is not capable of carrying out the trust as its creator directed. It rejected the argument that the order of the local court to change the trustee was in itself discriminatory state action.[31] This time the U.S. Supreme Court refused to review the state court decision.[32]

SEGREGATION IN FIELDS OTHER THAN EDUCATION

In deciding racial segregation in public schools to be discriminatory *per se* and thus a denial of equal protection, the Supreme Court in the first *Brown* decision referred to the "feeling of inferiority as to their status in the community" that separation generates in children of school age. One week later, on May 24, 1954, the court cited this decision in a case turning upon the question whether it was

[27] See below, note 41.

[28] That action by the state in its proprietary capacity is state action under the Fourteenth Amendment, has been held by a court of Appeals in *City of Petersburg* v. *Alsup*, 238 F. 2d 830 (1956), cert. denied, 353 U.S. 922 (1957).

[29] *Re Estate of Stephen Girard*, 386 Pa. 548 (1956).

[30] *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957), rehearing denied, 353 U.S. 989.

[31] 391 Pa. 434 (1958).

[32] 357 U.S. 570 (1958), rehearing denied, 358 U.S. 858.

legal to exclude Negroes from using an amphitheatre built by the City of Louisville, Kentucky, in a public park and leased to a private association. The Supreme Court vacated the decision of a lower federal court dismissing the Negroes' action and remanded the case for consideration " in the light of the segregation cases . . . and conditions that now prevail." [33] The plaintiffs in this case were adult Negroes. Hence, it must be assumed that the Supreme Court did not regard the feeling of inferiority created by racial segregation a phenomenon limited to Negro children, but existing also in the minds of adult Negroes. Any doubt as to the import of this decision due to the use of the vague phase " conditions that now prevail " were dispelled when, a year and a half later, the Supreme Court squarely held the decisions in the *School Segregation Cases* applicable to segregation of Negroes on public beaches, in public bath-houses, and on municipal golf courses.[34] The court thus clearly outlawed racial segregation in recreational facilities operated by the state or any of its subdivisions.

The trend toward broadening the basis of the rule in the Segregation Cases continued when, in November 1956, the court affirmed a federal court of appeal's decision striking down as unconstitutional an Alabama statute and a Montgomery City ordinance requiring racial segregation on city buses.[35] This being a case involving racial segregation in transportation, the courts had to clarify the question whether the Supreme Court decision in *Plessy* v. *Ferguson*, the authority for the " separate but equal " doctrine, still had some vitality. It is true that in the first *Brown* decision this doctrine had been discredited; but since *Plessy* v. *Ferguson* was a case dealing with segregation in transportion, it was not formally overruled when the Supreme Court outlawed segregation in public education.[36] However, the decision of a federal court of appeals in the Montgomery bus transportation case,[37] affirmed by the

[33] *Muir* v. *Louisville Park Theatrical Association*, 347 U.S. 971.

[34] *Mayor and City Council of Baltimore City* v. *Dawson*, 350 U.S. 877; *Holmes* v. *City of Atlanta*, 350 U.S. 879. In the first-mentioned case the court affirmed a lower federal court ruling applying the *School Segregation* decision to segregation on public beaches and in public bath-houses. In the second case the court vacated a decision which had required the City of Atlanta to provide Negroes with municipal golfing facilities but authorised it to do so on a segregated basis in accordance with the *Plessy* v. *Ferguson* doctrine; the Supreme Court remanded the case with direction to hold for plaintiffs in conformity with *Mayor* v. *Dawson*, *supra*. These decisions were followed in *New Orleans City Park Improvement Association* v. *Detiege*, 358 U.S. 54 (1958), rehearing denied, 358 U.S. 913.

[35] *Gayle* v. *Browder*, 352 U.S. 903.

[36] " *Any language* in *Plessy* v. *Ferguson* contrary to this finding [that segregation has a detrimental effect on Negroes] is rejected." (Emphasis added.)

[37] *Browder* v. *Gayle*, 142 F.Supp. 707. " In fact, we think that *Plessy* v. *Ferguson* has been impliedly though not explicitly overruled " (p. 717). In affirming, the Supreme Court cited *Brown* v. *Topeka* and the decisions outlawing segregation on public beaches, in public bath-houses and on municipal golf courses (above, note 34). This decision was followed in *Evers* v. *Dwyer*, 358 U.S. 202 (1958) where the Supreme Court held that a Negro who boarded

Supreme Court, puts *Plessy* v. *Ferguson's* complete demise beyond any doubt.

The Montgomery bus transportation case differs from the *School Segregation Cases* and those dealing with segregation in public recreational facilities in that the segregation involved occurred on buses owned and operated by a private corporation which, in seating members of the two races separately, complied with a state law requirement. Hence, the decision must be understood to extend the prohibition of racial segregation to any enterprise or pursuit, no matter by whom it is operated, if such segregation is required by state law.[38] The "state action," which is a prerequisite of the operation of the Equal Protection Clause, lies here in the state law requiring segregation.

The latest step in extending the doctrine of *Brown* v. *Topeka* to fields other than public education was taken in May 1959, when the Supreme Court affirmed a decision of a federal court declaring unconstitutional and void a Louisiana state law prohibiting athletic contests between whites and Negroes.[39] The lower court's decision summarised the present law as declared in the *School Segregation Cases* by stating that "classification based on race is inherently discriminatory"[40] and, if enforced by state officials or state agencies, is violative of the Equal Protection Clause of the Fourteenth Amendment.

From this it would seem to follow that a statute or ordinance requiring racial segregation in *whatever* situation is unconstitutional[41] as is the action of state officials enforcing segregation

a city bus in Memphis, Tennessee, for the only purpose of testing the constitutionality of the Tennessee law requiring racial segregation on buses, had a "substantial, immediate and real interest in the validity of the statute"; it vacated a lower court decision dismissing the action on the ground that no "actual controversy" existed.

[38] Segregation maintained by private persons in their enterprises on their own will without requirement on the part of the state, is outside of the scope of the Equal Protection Clause. See above, note 25. (A possible exception exists in cases where the private enterprise is of such dimension or importance that it may be held to carry on quasi-governmental functions. See *Marsh* v. *Alabama*, 326 U.S. 501 (1946), the case of a company town.) But a number of states in the North in the exercise of their police power have passed statutes prohibiting discrimination (and segregation) in private enterprises which are open to the public (so-called "places of public accommodation"). See Hartmann in 12 M.L.R. p. 451.

[39] *Dorsey* v. *State Athletic Commission*, 359 U.S. 533, affirming 168 F.Supp. 149 (rehearing denied, 360 U.S. 940).

[40] This holding has been foreshadowed by a dictum of the U.S. Supreme Court in a case dealing with wartime restrictions against citizens of Japanese ancestry: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason *legislative classification* or discrimination based on race alone has often been held to be a denial of equal protection." (emphasis added) *Hirabayashi* v. *U.S.*, 320 U.S. 81, 100 (1943).

[41] Query: Is *court* enforcement of state anti-trespass laws, used to keep Negroes from private places which pursue a policy of segregation, in violation of the Fourteenth Amendment? *Cf. Shelley* v. *Kraemer*, 334 U.S. 1 (1947). This question may arise in connection with the recent lunch counter incidents in the South.

anywhere. It is noteworthy that this vast extension of the doctrine in *Brown* v. *Topeka* was achieved by short *per curiam* decisions in which the Supreme Court, citing at most its ruling in the *School Segregation Cases*, simply affirmed or vacated lower court decisions.

The Little Rock Case

In one case only since the second *Brown* opinion of 1955 did the Supreme Court hand down a full opinion [42] in a school segregation issue. This was the case arising from the school crisis in Little Rock, Arkansas, the city which became world-famous when first the state governor used armed forces of the state to prevent implementation of a court order requiring admission of nine Negro children to a public high school, and subsequently the President of the United States employed federal troops to enforce the court order.[43] The immediate question before the Supreme Court was whether a court-approved desegregation plan providing for gradual desegregation within six years could be suspended for two and a half years [44] after one year's operation because of difficulties arising from public hostility "which . . . had been engendered largely by the official attitudes of the governor and the legislature."

In a unanimous opinion, unusual in that it was signed by all nine justices,[45] the court affirmed a federal court of appeal's reversal of a federal district judge's decision authorising the suspension of the desegregation plan.[46] The court relied on the views it had expressed in the two *Brown* decisions; however, it stressed more the positive duty of the state authorities to desegregate than the reasons for doing so in a step-by-step fashion. In particular, the opinion emphasised that neither popular hostility nor opposition by the state governor and the legislature could justify delay in implementing public school desegregation.

The court took the opportunity to react to the doctrine of "interposition" used extensively by opponents of desegregation to justify disobedience to the Supreme Court's rulings in the *School Segregation Cases*. This doctrine, expressed in a number of resolutions passed by legislatures in the South following the *Brown* decisions,[47] holds that a state, as a party to the "compact" creating the United States, may interpose its authority whenever a

[42] As distinguished from an unsigned *per curiam* decision.

[43] See Freund, *loc. cit.*, p. 351 *et seq.*

[44] With the result that Negro pupils attending desegregated schools would be sent back to Negro schools.

[45] Ordinarily an opinion representing the unanimous or prevailing view is written and signed by one justice, who announces it as the court's opinion.

[46] *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

[47] For text of resolutions passed by the legislatures of Alabama, Georgia, Mississippi, South Carolina and Virginia, see 1 *Race Relations Law Reporter*, p. 437 *et seq.*

federal organ—including a federal court—transgresses the limitations of federal authority set forth in the Constitution.[48] In essence, this theory denies both the federal concept, as expressed in the U.S. Constitution, and the rule of law implicit in which is the authority of the courts to declare what the law is. In dealing with this doctrine, the Supreme Court recalled what it termed "basic constitutional propositions which are settled doctrine." It referred to Article VI of the Constitution which declares the Federal Constitution to be the "supreme Law of the Land." Citing a famous decision of 1803, which established the right of the federal courts to review the constitutionality of statutes,[49] the court said that "the federal judiciary is supreme in the exposition of the law of the Constitution," a principle which it termed "a permanent and indispensable feature of our constitutional life." In its final paragraph the court solemnly[50] reaffirmed its continued[51] adherence to the doctrine that state support of segregated schools denies equal protection[52] required by the Fourteenth Amendment. The opinion closed with these ringing words:

> The principles announced in [the first *Brown*] decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.

School Closing Plans

At the time when the Supreme Court decided the Little Rock case, there were under way in Arkansas and elsewhere legislative plans to close public schools which were under court order to integrate, and to replace them by "private" segregated schools.[53] These would be operated by private groups to whom the school buildings and equipment would be leased, and who would employ the teachers of the closed-down public schools. Aware of these "evasive schemes," the Supreme Court took pains to declare their constitutional invalidity, although this question was not before the court in the Little Rock school case. The opinion stated that state support of segregated schools "through any arrangement, management, funds, or property" could not be squared with the state's obligation under

[48] See Friedmann, 19 M.L.R. pp. 471, 473. On the history of the doctrine of interposition (also called nullification) see Freund, *loc. cit.*, p. 346 *et seq.*

[49] *Marbury* v. *Madison*, 1 Cranch 137, announced by Chief Justice John Marshall for a unanimous court.

[50] In this opinion the Supreme Court "not only announced a decision, it also expressed a mood." Note in 23 *Albany Law Review* 405.

[51] The opinion stresses that the three new Justices who joined the court since the first *Brown* decision are at one with the Justices still on the court as to the correctness of that decision.

[52] And also due process. See above, note 7.

[53] Which would not be subject to the Fourteenth Amendment. See above, note 25.

the Equal Protection Clause.[54] Relying on this statement, a federal court of appeals ordered the issuance of an injunction barring the school board of Little Rock from leasing to a private segregated school system the high schools of that city, which had been closed by the State Governor[55] on the day when the Supreme Court announced its decision in the Little Rock school case.[56]

In view of the Supreme Court's strong denunciation of "evasive schemes," states determined to avoid even the slighest measure of school integration were left with the possibility of simply closing those schools faced with a court order requiring immediate desegregation. In the absence of a state-sponsored substitute scheme, parents of the pupils affected would have to resort to genuine private schools, if they could afford them, or else would have to leave their children without education.[57] Although at least ten states have passed laws requiring the closing down of public schools faced with a court order ordering immediate desegregation,[58] the actual closing of schools occurred only in Little Rock, Arkansas, and in a few communities in Virginia. However, this device to avoid desegregation was challenged immediately.[59] Three-judge federal district courts[60] in both states struck down as unconstitutional the state laws authorising the closing of public schools and the actions by the Governors of Virginia and Arkansas thereunder. Each court did so on different grounds. Only the Arkansas decision was appealed to the Supreme Court, which affirmed it without opinion. Hence, the Supreme Court's reasoning in arriving at the conclusion that such laws are unconstitutional is not known.

The federal court dealing with the Norfolk, Virginia, case[61]

[54] The opinion cited two recent decisions by federal courts of appeal which held that the right to use facilities owned by a state agency may not be defeated by leasing them to private persons: *Department of Conservation and Development* v. *Tate*, 231 F. 2d 615 (1956) (state park); *Derrington* v. *Plumer*, 240 F. 2d 922 (1956) (lunchroom in courthouse). In both cases the Supreme Court refused to review the lower court decisions: 352 U.S. 838; 353 U.S. 924.

[55] Acting under authority of a state law enacted shortly before.

[56] 261 F. 2d 97 (1958).

[57] A repeal of the compulsory education laws is part of this scheme. The Virginia school closing law, which was enacted while a provision of the State Constitution requiring the maintenance of an "efficient system of public free schools throughout the State" remained in force, was declared void by the State Supreme Court as conflicting with that provision of the State Constitution: *Harrison* v. *Day*, 200 Va. 439 (1959).

[58] Greenberg, *loc. cit.*, p. 240.

[59] The difficulties were not only of a legal nature. It soon appeared that many adherents of segregation preferred public schools with a certain degree of integration to no public schools at all. Governor J. Lindsay Almond of Virginia, an ardent segregationist, said that the state cannot afford to "suffer the catastrophe of permitting the public school system to be destroyed": *Southern School News*, July 1959, p. 6.

[60] Under federal procedure a case involving the charge that a state law is in conflict with the federal constitution must be heard by a 3-judge district court—a so-called constitutional court—whose determination may be appealed directly to the U.S. Supreme Court (avoiding the intermediary step of an appeal to a federal court of appeals). 28 USC 2281.

[61] *James* v. *Almond*, 170 F.Supp. 331 (1959).

agreed with plaintiffs—*white* children who found themselves without public schools—that the state, under the Equal Protection Clause, could not close some public schools (to avoid desegregation) *while leaving other schools open*. This amounted to discrimination against all children affected by the closing, whites and non-whites. The court ordered the closed schools reopened, and the state complied, admitting a few Negroes to the formerly "white" schools.[62]

The action in Arkansas was brought by Negro pupils who had attended the four high schools in Little Rock closed by Governor Orval Faubus' order. Here the lower federal court found[63] that the reasons for the closing of the schools by order of the Governor were the same "deplorable conditions" which had prompted a district court judge in 1957 to suspend desegregation for two and a half years. If these conditions did not justify suspension, as held by the Supreme Court,[64] the less so could they form a basis for a closing of schools. The court concluded that the Arkansas state law authorising the Governor to close schools faced with integration orders did not constitute a reasonable exercise of the state police power, and thus violated the guarantee against denial of due process set forth in the Fourteenth Amendment.[65] In addition, the court cited the Equal Protection Clause as a basis of its decision, without, however, indicating whether it did so because it agreed with the reasoning of the court which had struck down the Virginia school closing law.

Pupil Placement Plans

Pupil placement legislation is another device developed to counteract integration in public schools. It has withstood court scrutiny much better than the more radical school closing schemes.

The pupil placement laws enacted since 1954 in at least ten states[66] continue the existing dual system of public education as a

[62] This decision and the state court decision mentioned in note 57—both decisions were rendered on the same day—killed the Virginia "massive resistance" scheme, adopted by the state legislature, under which the state undertook to maintain complete segregation of all public schools. Subsequently, control over the segregation policy of the schools was returned to the local school board under the so-called local option plan (*Southern School News*, May 1959, p. 2). One such board—in Prince Edward County—in September 1959 closed *all* public schools in the county (see *Southern School News*, October 1959) to avoid compliance with a court desegregation order. Since this action treated all children in the county equally, it may not be open to attack on equal protection grounds. A possible line of attack is based on the Due Process Clause. See text below on Arkansas school closing case. At this writing a court attack on the school closing in Prince Edward County has not been made.

[63] *Aaron* v. *McKinley*, 173 F.Supp. 944 (1959), affirmed as *Faubus* v. *Aaron*, 361 U.S. 197 (1959).

[64] *Cooper* v. *Aaron*, 358 U.S. 1; see above, note 46.

[65] ". . . nor shall any State deprive a person of life, liberty, or property, without due process of law." This provision protects not only against procedural irregularities but also against state action of an unreasonable, arbitrary or capricious nature (so-called substantive aspect of due process). See *Nebbia* v. *New York*, 291 U.S. 502 (1934).

[66] Greenberg, *loc. cit.*, p. 233.

de facto situation; they set up administrative machinery to assign first-grade pupils to specific schools and to pass upon requests of individual pupils for transfer to a school other than that which they attend or are allocated to. Usually these laws list a number of criteria, none directly related to race, to be considered in deciding upon the placement of schoolchildren. This system leaves to the Negro pupil and his parents the initiative to seek admission to a "white" school. Fear of creating troubles, reluctance to go through administrative proceedings, or simple inertia keeps down the number of Negro pupils (or their parents) who will avail themselves of the opportunity to apply for transfer. Since the non-racial factors to be considered under these laws in deciding upon requests for transfer present different aspects in the case of each child, this system does not lend itself to mass applications for transfer of Negro pupils. Under the doctrine that court review of administrative decisions presupposes the exhaustion of administrative remedies,[67] a Negro pupil must go through the machinery provided by the pupil placement laws before going to court for redress. When the case finally reaches the court, the pupil is faced with the difficult task of proving that the non-racial factors cited by the state board as ground for refusing a transfer are but a pretext used to prevent the transfer of a Negro pupil to a "white" school. Hence, it is not surprising that the result of the operation of these laws has been token integration, at best, and continuation of strict segregation, at worst.

The pupil placement laws do not reflect the spirit of the *Brown* decisions, which would seem to place on the states the duty to plan and carry out a programme of racial integration of all its public schools in order to protect the rights of *all* its pupils to be free from racial discrimination. Rather, these laws are based on the view that all a state is bound to do under the *Brown* decisions is to see to it that an individual Negro pupil *who asserts* his constitutional right is not denied admission to a particular school because of his race.

Three of the state pupil placement laws have been declared unconstitutional by federal courts: the Louisiana Act, because it provided no standard for the administrative board's placement decisions[68]; the Virginia Act, because, considered in the context of state legislation and policy against desegregation (including the law requiring closing of schools forced to desegregate), it provided no adequate remedy[69]; the Florida Act, because no constitutional assignment of pupils was possible so long as the requirement of racial segregation was continued in the public school system.[70] On

[67] See note in 57 *Columbia Law Review* 537.
[68] *Orleans Parish School Board* v. *Rush*, 242 F. 2d 156 (1957), cert. denied, 354 U.S. 921.
[69] *School Board of Newport News* v. *Atkins*, 246 F. 2d 325 (1957), cert. denied, 355 U.S. 855.
[70] *Gibson* v. *Board of Public Instruction of Dade County*, 272 F. 2d 763 (1959).

the other hand, pupil placement laws were upheld as non-discriminatory on their face by federal courts in South Carolina,[71] North Carolina,[72] Alabama [73] and Arkansas.[74]

The only case reviewed by the Supreme Court on its merits [75] is that involving the Alabama law. Four Negro schoolchildren of Birmingham, Alabama, requested to be placed in schools closest to their homes on a non-discriminatory basis. The Board of Education subjected the children to tests authorised by the pupil placement law but failed to act upon the petition within thirty days as required by the law. The pupils then brought an action to have the state pupil placement law declared unconstitutional. They urged that while some of the factors which under the law must be considered in deciding upon petitions for placement are germane to education, others [76] are not, and permit decisions on purely racist grounds. A three-judge federal district court dismissed the action. The court took the position that the issue in the case was whether the Alabama pupil placement law was unconstitutional on its face, rather than in its application. It pointed out that in trying to show unconstitutionality of the law on its face, plaintiffs " have assumed a heavy burden indeed." They would have to show that their exclusion from the schools of their choice *could not* be based on one or more of the admitted proper tests.[77] In the view of the court, the school placement law furnished legal machinery for " admission of qualified pupils upon a basis of individual merit without regard to their race or colour. We must presume," the court added, " that it will be so administered. If not, in some future proceeding it is possible that it may be declared unconstitutional in its application."

The Supreme Court affirmed " upon the limited grounds on which the district court rested its decision." These words seem to reflect a certain uneasiness of the court about the impact of the decision upholding the Alabama pupil placement law. Such uneasiness would be understandable, particularly if the record of Alabama as one of the few states that have been able to prevent

[71] *Hood* v. *Board of Trustees of Sumter County School District*, 232 F. 2d 626 (1956), cert. denied, 352 U.S. 870.

[72] *Carson* v. *Warlick*, 238 F. 2d 724 (1956), cert. denied, 353 U.S. 910 (1957); *Covington* v. *Edwards*, 264 F. 2d 780 (1959), cert. denied, 361 U.S. 840; *Holt* v. *Raleigh City Board of Education*, 265 F. 2d 95 (1959), cert. denied, 361 U.S. 818.

[73] *Shuttlesworth* v. *Birmingham Board of Education*, 162 F.Supp. 372 (1958), affirmed, 358 U.S. 101 (1958).

[74] *Parham* v. *Dove*, 271 F. 2d 132 (1959).

[75] In the other cases the Supreme Court refused to review the lower court decisions. See below, note 84.

[76] " The psychological qualification of the pupil for the type of teaching and association involved; . . . The physical effect upon the pupil of attendance at a particular school; the possibility of threat or friction or disorder among pupils or others; the possibility of breaches of the peace or ill will or economic retaliation within the community; the maintenance or severance of established social and psychological relationship with other pupils and with teachers."

[77] *e.g.*, available room and teaching capacity in the various schools, availability of transportation, scholastic aptitude and relative intelligence or mental energy or ability of the pupil, etc.

even the slightest degree of desegregation is considered. That state's determined stand in favour of racial segregation is reflected in a Resolution on Interposition and Nullification declaring the Supreme Court's decisions in the *School Segregation Cases* as null and void,[78] and in legislation authorising separate schools for white and coloured children whose parents desire that their children attend schools with members of their own race.[79] There is little doubt that the Alabama pupil placement law is being used to carry on a pattern of strict segregation. It must be expected, however, that the day will come when the continued systematic exclusion of Negroes from Alabama "white" schools will make inevitable a holding by the federal courts that the pupil placement law is administered in a discriminatory way.[80]

On the other hand, in states with a less adamant attitude, a pupil placement law provides a device to keep racial integration in public schools to a minimum ("token integration"). North Carolina is a good example. After a four-year operation of its pupil placement law [81] which was upheld by federal courts,[82] a total of thirty-four Negro pupils attended integrated public schools in the 1959–60 school year.[83] The fact that some, though few, Negroes have been desegregated will make it more difficult to prove that that state's pupil placement law is administered in a discriminatory manner.

Various Desegregation Plans

Not all cases that reach the Supreme Court are examined by it on their merits. In a large majority of cases the Supreme Court may, in its discretion, deny to review the lower court's decision,[84] and frequently does so.[85] This happens if less than four out of the nine justices favour review. The Supreme Court has said repeatedly that no conclusion as to its attitude on the merits of a case may be drawn from a denial to grant review.[86] Such a denial, for example, may be due to the fact that at least six justices believe that the lower court's decision, though wrong, involves an issue which is not of sufficient general importance to warrant the court's attention.

In an appreciable number of cases involving the application of the *Brown* doctrine, the Supreme Court has denied petitions for

[78] Act No. 42, Special Session 1956 of the Alabama Legislature.
[79] Act No. 117 of Second Special Session, 1956, of the Alabama Legislature.
[80] This has been predicted by Alabama's Governor, John Patterson, who added that as soon as this happens the Alabama schools will be closed: *Southern School News*, February 1959, p. 9.
[81] *Public Laws*, 1955, Chap. 366.
[82] See above, note 72.
[83] *Southern School News*, April 1960, p. 1.
[84] The technical term is "denial of petition for writ of certiorari," abbreviated: "cert. denied."
[85] See note in 73 *Harvard Law Review* 129.
[86] *Agoston* v. *Commonwealth of Pennsylvania*, 340 U.S. 844 (1950).

review of lower court decisions. In view of the burning nature of the desegregation issue after 1954, it is likely that at least four justices would have voted in favour of reviewing any decision appearing to be in blatant conflict with the rulings in the *School Segregation Cases*. Therefore, despite the rule referred to above, governing the meaning of a Supreme Court decision denying review, it may not be without interest to mention a few lower court decisions which the Supreme Court refused to review, thus letting them stand[87]: a decision approving, as "good faith" compliance with the *Brown* decisions, a plan of gradual desegregation of elementary schools over a period of two years and of secondary schools over a period of five years[88]; a decision rejecting as "good faith" compliance a plan fixing seven years for completion of desegregation without providing for any immediate start[89]; a decision approving a gradual desegregation plan in the City of Nashville, Tennessee, with the first three grades already desegregated and nine more years needed to carry desegregation to the highest grade.[90] This last decision is of interest also because the federal court of appeals in rendering it passed upon two special features of the plan, proposed by the city school board. It disapproved a proposal which, in addition to integrated schools, would have permitted the operation of separate schools for Negro and for white children whose parents voluntarily elect that such children attend schools with members of their own race. Such schools, the court held, would be racially separated in contravention of the *Brown* doctrine. On the other hand, the court approved a plan permitting the voluntary transfer of any white or Negro student from a school where the majority of the students are of a different race. It is noteworthy that three Supreme Court justices—one short of the required quorum of four—voted to grant a review of the Court of Appeal's decision on the question whether this latter plan is constitutionally invalid because it "explicitly recognised race as an absolute ground for transfer of students between schools, thereby perpetuating, rather than limiting, racial discrimination."[91]

State Action Against Negro Organisations

To round up the discussion of efforts made by state governments[92] to thwart or delay desegregation in public schools, mention should

[87] Some instances have been mentioned already; see notes 28, 54, 68, 69, 71, 72.

[88] *Slade* v. *Board of Education of Harford County, Maryland*, 252 F. 2d 291 (1958,) cert. denied, 357 U.S. 906.

[89] *County School Board of Prince Edward County, Virginia* v. *Allen*, 266 F. 2d 507 (1959), cert. denied, 361 U.S. 830.

[90] *Kelley* v. *Board of Education of City of Nashville, Tennessee*, 270 F. 2d 209 (1959), cert. denied, 361 U.S. 924.

[91] This is one of the rare instances where, in a question related to desegregation, the nine justices of the Supreme Court did not present a united front.

[92] A discussion of private pressures, economic and other, preventing the Negroes in some places of the Deep South from asserting their constitutional rights is

be made of measures taken against the National Association for the Advancement of Colored People (NAACP), the civil rights organisation which has borne the brunt of the fight for desegregation.[93] It sponsored the litigation which resulted in the *School Segregation* decisions, as well as most of the subsequent suits to implement these decisions throughout the South. Without the support of the NAACP very few Negroes would have been able to carry on their legal fight against segregated schools. Hence, it could be expected that measures aimed at curbing the NAACP would tend to reduce the momentum of the drive toward school integration.

Lawsuits brought by the NAACP to test the constitutionality of such laws enacted in Virginia and Arkansas reached the Supreme Court. The Virginia statutes in question required the registration of persons and organisations engaged in the solicitation of funds to be used in the prosecution of suits, defined the crime of barratry, and prohibited the inducement and instigation of legal proceedings. A three-judge federal district court declared two of the five statutes involved unconstitutional on their face as abridging free speech and freedom of association, while it found the other statutes ambiguous and decided to hold back their scrutiny until the state courts would have had an occasion to interpret them.[94] On appeal, the Supreme Court held, by a majority of six to three, that the lower court, with respect to all five statutes, should have abstained from deciding the question of constitutionality, to give the state courts an opportunity to construe them, if possible, in a manner consistent with the Constitution.[95] Subsequently, in a case involving the constitutionality of Arkansas legislation against NAACP the court sought to clarify its prior holding by stating that reference to state courts for interpretation should not be made automatically, meaning obviously that if the statute is clearly unconstitutional the federal court should declare it void.[96]

outside the scope of this article. The effectiveness of these pressures and of the fears they engender may be gathered from the fact that, *e.g.*, in the state of Mississippi, with a school population in 1950 of 284,000 whites and 293,000 Negroes (*Public Education in the South Today and Tomorrow*, Univ. of N. Carolina Press, 1955, p. 37) and complete segregation of races in public education, not a single desegregation suit has been brought since the *Brown* decision of 1954.

93 For a description of the role played by that organisation see 58 *Yale Law Journal* 581 *et seq.*

94 *NAACP* v. *Patty*, 159 F.Supp. 503 (1958).

95 *Harrison* v. *NAACP*, 360 U.S. 167 (1959). The court applied the doctrine of "equitable abstention" intended to avoid the appearance of competition between the state and federal judicial systems. See 2 *Race Relations Law Reporter* 1222.

96 *NAACP* v. *Bennett*, 360 U.S. 471 (1959), reversing a lower federal court decision which had deferred a ruling on the constitutionality of the statutes pending scrutiny by state courts although the court "assumed" that the unconstitutionality of the Arkansas statutes was obvious. *NAACP* v. *Patty*, 178 F. Supp. 189. After remand, the lower court held that its assumption had been wrong, that the statutes were not clearly unconstitutional and that therefore it would still defer ruling until the statutes were interpreted by the Arkansas state courts. 178 F.Supp. 191 (1959).

The result of this treatment of state legislation by the Supreme Court is a considerable delay before a final, binding adjudication of their constitutionality is reached. On the other hand, the court showed no reluctance to come to grips with the problem when the issue was not the constitutionality of statutes but of administrative action in requiring NAACP to submit its membership lists in proceedings aimed ostensibly at enforcing state corporation or tax laws. Alabama state courts had fined the local NAACP branch $100,000 for contempt of court because it had refused to submit its membership list in proceedings under a state law dealing with the qualification of foreign (*i.e.*, out-of-state) corporations to do business in the state. In reversing the judgment of the Alabama Supreme Court affirming the imposition of the fine, the U.S. Supreme Court held that the "compelled disclosure of petitioner's Alabama membership is likely to affect the ability of petitioner and its members to pursue their collective effort to foster beliefs which they have admittedly the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." Hence, the state action abridged the NAACP members' freedom of association guaranteed by the federal constitution, and did so without any justification since the state did not need to know the names of the members to decide the question of the group's qualifications to do business in Alabama.[97] The court applied this decision when, in a later case, it reversed a decision of the Arkansas Supreme Court affirming a conviction of NAACP functionaries in Little Rock for failing to submit a membership list in connection with proceedings to determine whether a municipal licence tax should be levied on the organisation.[98]

Conclusion

The effectiveness of the Supreme Court decision in the *School Segregation Cases* should not be judged by normal standards applied to court decisions. After all, the ruling of 1954 brought about a change in the law which, considering political realities, could never have been effectuated by constitutional amendment or by federal legislation. With this in mind, it may be said that the decision has stood its ground well. One important reason is that public opinion in a major part of the country—and, for that matter, world opinion—stands firmly behind the court's ruling. In large areas of the traditional South, the new doctrine is recognised as law and obeyed, though sometimes grudgingly. It is true that in a

[97] *NAACP* v. *Alabama*, 357 U.S. 449 (1958). Subsequently, the Alabama Supreme Court reimposed the fine for NAACP failure to submit other papers. The U.S. Supreme Court again reversed, 360 U.S. 240 (1959), rehearing denied, 361 U.S. 856.

[98] *Bates* v. *Little Rock*, 361 U.S. 516 (1960).

few states in the Deep South the decision has thus far remained a dead letter. But these states find themselves in isolation; throughout the rest of the country the prevailing attitude is one of respect for what the Supreme Court says is the law of the land. There are many disadvantages to isolation and they are evident to the recalcitrant states; thus, pressures are created which tend to force these states back into the mainstream of American life and attitudes.

Paul Hartman.*

Postscript

The recent controversy arising from the refusal of department stores in the South to serve Negro customers at lunch counters and the resulting sit-down demonstrations does not involve the validity of segregation laws but the applicability of trespass laws. Some states (*e.g.*, Virginia, Georgia) after the demonstrations passed laws which make it a crime for a person to remain in a place after having been asked by the owner to leave. (See note 41 on the constitutionality of the *enforcement* of these laws to achieve segregation.) In the absence of such a law, the question is whether a Negro who entered a department store as an invitee or licensee (no restrictions apply to his buying articles at counters other than the lunch counter) commits trespass by refusing to leave the lunch counter at the proprietor's request. The answer would seem to be in the negative if a famous English case decided 350 years ago still serves as authority. In that case, six carpenters who entered Queen's Head Tavern in London as guests, and, having been served wine and paid for it, ordered more wine, for which they refused to pay, were held not to be trespassers because their wrong consisted in a mere non-doing.[99]

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[99] *The Six Carpenters' Case* (1610) 8 Co.Rep. 147a; 77 E.R. 695.

RETURN TO DUNLOP *v.* SELFRIDGE?

Introduction

It is remarkable how apparently obvious and fundamental questions can remain unsettled for centuries, either because they are never litigated at all, or because the courts vacillate between different possible solutions thereof. One of the most important examples of this phenomenon in English law arises out of the attempts of the courts to grapple with the question whether a contract made for the benefit of a third party can be enforced by that third party even though he was not a party to the contract and did not give consideration. The early history of this problem at common law is disputed.[1] During the seventeenth, eighteenth and early nineteenth centuries cases can be found which support the proposition that a third party can enforce a contract made for his benefit [2] and cases can equally be found which are inconsistent with that view,[3] but controversy as to which was the rule and which the exception is of no more than historical interest in view of the clear pronouncements on the common law rule to be found in *Tweddle* v. *Atkinson* [4] and *Dunlop* v. *Selfridge*.[5]

While the common law was arriving at the rule that a third party cannot sue to enforce a contract made for his benefit, equity in a long series of cases from *Tomlinson* v. *Gill* [6] onwards gave a remedy to the third party by the use of the trust concept. Since trusts were discovered where nothing more emerged than an intention to benefit the third party, one might have been forgiven for supposing that a method of mitigating, if not of altogether avoiding, the common law rule had been designed. This view appeared to have been confirmed when the House of Lords set the seal of its approval on the wide inference of trusts of promises in *Les Affréteurs Réunis* v. *Walford*.[7] Such was the view taken by Professor Corbin in 1930 in his authoritative review of the cases.[8]

[1] *Cf.* E.J.P., 70 L.Q.R. 467, and Denning L.J. in *Smith and Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500; [1949] 2 All E.R. 179, and *Drive Yourself Hire Co.* v. *Strutt* [1954] 1 Q.B. 250; [1953] 2 All E.R. 1475.

[2] *Dutton* v. *Poole* (1678) 2 Lev. 210; *Martyn* v. *Hind* (1776) 2 Cowp. 437; *Marchington* v. *Vernon* (1787) 1 Bos. & P. 101; *Carnegie* v. *Waugh* (1823) 2 Dowl. & Ry.K.B. 277. There are also a large number of cases before *Dutton* v. *Poole* not cited by either Denning L.J. or E.J.P. See Corbin, 46 L.Q.R. 12 at p. 17, note 11.

[3] *Bourne* v. *Mason* (1669) 1 Vent. 6; *Crow* v. *Rogers* (1724) 1 Stra. 592; *Price* v. *Easton* (1833) 4 B. & Ad. 433.

[4] (1861) 1 B. & S. 393.

[5] [1915] A.C. 847.

[6] (1756) Ambler 330; and see, *e.g.*, *Gregory* v. *Williams* (1817) 3 Mer. 582; *Re Flavell* (1883) 25 Ch.D. 89; *Lloyd's* v. *Harper* (1880) 16 Ch.D. 290.

[7] [1919] A.C. 801.

[8] 46 L.Q.R. 12.

The courts have never explicitly repudiated this approach, but in recent years the trust has fallen into desuetude as a means of enforcing contracts in favour of third parties. Professor Cheshire and Mr. Fifoot [9] adopt the view of Dr. Glanville Williams [10] that "the way in which the court will decide a novel case is almost completely unpredictable" but, with respect, it seems only too clear that the chances of persuading a court to infer a trust from evidence of intention to benefit the third party have in recent years diminished almost to vanishing point.[11] It is not easy to understand either on principle or authority why the courts so soon retreated from the apparently attractive haven of *Walford's* case.[12] It cannot simply be ascribed to the forces of reaction since Lord Wright, one of the most forward-looking judges of his day, delivered the opinion of the Privy Council in *Vandepitte's* case,[13] probably the most important single pronouncement against a wide application of the trust concept; yet only four years later signed as chairman the Sixth Interim Report of the Law Revision Committee [14] which recommended "that where a contract by its express terms purports to confer a benefit directly on a third party, it shall be enforceable by the third party in his own name subject to any defences that would have been valid between the contracting parties." If we may make an inference from Lord Wright's extrajudicial description of the trust as a "cumbrous fiction," [15] it seems likely that the original objection to the trust was not so much that it produced unsatisfactory results as that it was inelegant. No doubt it is desirable to employ techniques which are as simple as possible, but in view of the studied indifference of Parliament to the recommendations of the Law Revision Committee, one is tempted to regard the final result of this *volte-face* as a classic example of the maxim that the better is the enemy of the good.

Vandepitte's case [16] and its progeny did not mark an end to the struggles of the courts. In recent years Denning L.J. and Devlin J. (as they then were) have cast considerable doubt on the existence of an inflexible rule that a third party cannot sue to enforce a

[9] 5th ed. at p. 375.
[10] 7 M.L.R. 123.
[11] See, *e.g.*, *Re Engelbach* [1924] 2 Ch. 348; *Vandepitte* v. *Preferred Accident and Insurance Corporation of New York* [1933] A.C. 70; *Re Stapleton-Bretherton* [1941] 1 Ch. 482; *Re Schebsman* [1944] Ch. 83; *Re Clay's Policy of Assurance* [1937] 2 All E.R. 548; *Re Sinclair's Life Policy* [1938] Ch. 799; *Re Foster* [1938] 3 All E.R. 357; *Re Miller's Agreement* [1947] Ch. 615; *cf. Re Webb* [1941] 1 Ch. 225.
[12] [1919] A.C. 801; see *per* Fullagar J. in *Wilson* v. *Darling Island Stevedoring and Lighterage Co.* (1956) 95 C.L.R. 43 at 67: "it is difficult to understand the reluctance which courts have sometimes shown to infer a trust in such cases."
[13] [1933] A.C. 70.
[14] Cmd. 5449 at p. 30.
[15] 55 L.Q.R. 189 at p. 208 in a review of *Williston on Contracts*.
[16] [1933] A.C. 70.

contract made for his benefit.[17] The result of these cases has been very fully analysed by Mr. Dowrick.[18] Denning L.J. and Devlin J. took the view that a third party can enforce the contract if he has a "sufficient interest" to do so, and without attempting a final definition of "sufficient interest" they offered a catalogue of situations in which such a "sufficient interest" was present. As Mr. Dowrick points out, some of these must be regarded as dubious in the light of the authorities and the others are capable of explanation on other grounds such as agency or a collateral contract. These explanations, however, are often merely rationalisations of the desire of the court to give a remedy to the third party and there is much to be said for openly regarding them as exceptions to the rule that there is no *jus quaesitum tertio* by way of contract. Until recently therefore it seemed possible to argue that, even if *Dunlop* v. *Selfridge*[19] represented an obstacle to a full acceptance of Denning L.J.'s views, it did not inevitably prevent a third party suing on a contract made for his benefit, since it was possible that other authorities might have created an exception to cover the facts of the particular case. The purpose of this paper is to consider whether some recent decisions[20] have compelled an abandonment of this position.

It may be permissible to preface this survey by some discussion of the policy considerations involved. English law is not alone in having experienced vacillations of judicial opinion on this topic. Nearly sixty years ago Williston opened an article in the *Harvard Law Review*[21] with the words:

> "In no department of the law has a more obstinate and persistent battle between practice and theory been waged than in regard to the question: whether a right of action accrues to a third person from a contract made by others for his benefit?"

That the problem is not even peculiar to common law jurisdictions is shown by the fact that these words were taken from a translation of a work published by the German scholar Busch in 1860.[22] The view that a third party cannot sue upon a contract made for his benefit is usually stated by its exponents as a self-evident truth derived from the very nature of a contract. It is undoubtedly

[17] *Smith and Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500; [1949] 2 All E.R. 179; *Drive Yourself Hire Co.* v. *Strutt* [1954] 1 Q.B. 250; [1953] 2 All E.R. 1475; *Adler* v. *Dickson* [1955] 1 Q.B. 158; [1954] 3 All E.R. 397; *Pyrene Co., Ltd.* v. *Scindia Navigation Co., Ltd.* [1954] 2 Q.B. 402; [1954] 2 All E.R. 158.

[18] 19 M.L.R. 374.

[19] [1915] A.C. 847.

[20] *Green* v. *Russell* [1959] 2 Q.B. 226; [1959] 2 All E.R. 525; *Midland Silicones, Ltd.* v. *Scruttons, Ltd.* [1959] 2 Q.B. 171; [1959] 2 All E.R. 289.

[21] 15 Harv.L.R. 767.

[22] Busch: *Doctrin und Praxis über die Gültigkeit von Verträgen zu Gunsten Dritter* (Heidelberg, 1860). See for a summary of the problem in other systems Dold, *Stipulations for a third party.*

true that the simplest and most obvious kind of contract is one which only concerns two parties and that there is no reason to regard those who would incidentally benefit from the performance of the contract as entitled to any rights. It by no means follows that all contracts are as a matter of logical necessity of this nature. This is obviously so where stress is laid on the promissory element in contract and the moral obligation to which it gives rise. It may be objected that in English law, at least, the basis of contract is bargain rather than promise [23] but even this is not an insuperable objection.[24] It is one thing to say that a gratuitous promise will not be enforced; it is quite another to say that a promise seriously made and bargained for may be repudiated because the person who bought the promise is not the person who seeks to enforce it.

In the final analysis, however, legal rules must be tested, not by logic alone, although the importance of that is not to be underestimated, but by the social consequences to which they give rise. It is submitted that rigid adherence to the doctrine of privity of contract gives rise to unsatisfactory results. First, there are a number of situations where it would seem that a person has a legitimate interest, which ought to be protected, in seeking to confer a benefit *in futuro* upon a third party. The most obvious example is insurance where social pressures have already compelled statutory modification of common law dogma. Secondly, the two-party contract is not an adequate tool to solve the complexities of modern commercial life, where many transactions involve a long chain or a complex web of parties. Today few manufacturers sell direct to the public and it is necessary for them to operate through wholesalers and retailers. Yet in a non-legal sense the customer thinks of himself as buying that manufacturer's product and the manufacturer makes elaborate and expensive advertisement of his products to the consumer. Further, the manufacturer needs to be able to assure each retailer that all other retailers will be selling branded products at the same price.[25] We should not be surprised, therefore, if the manufacturer seeks to have some control over the price at which the goods are sold or the condition in which they reach the public. Similarly there are transactions in which according to the traditional analysis there is only a contract between A and B, and between B and C, but in which it may be desirable to bring A and C into relationship with each other. An obvious example is the banker's commercial credit, where according to the orthodox view there is a contract between the buyer and seller, and between the buyer and his banker, but no contract between the seller and the banker. In this particular case, indeed, this is such an inconvenient result that much ingenuity has been

[23] Though *cf.* Roscoe Pound (1959) 33 Tulane L.R. 455.
[24] The relation between the doctrine of privity of contract and the rule that consideration must move from the promisee is considered *infra*.
[25] See B. S. Yamey, *Economics of Resale Price Maintenance*.

devoted to suggesting ways of avoiding it [26] but it seems no more than a special example of a general tendency.

GREEN *v.* RUSSELL

The right of a third party to enforce a contract made for his benefit did not arise directly in *Green* v. *Russell*.[27] In that case the defendant Russell, an employer, had taken out a personal accident group policy to provide for certain payments in the event of accidents to his employees, causing personal injuries or death. The plaintiff's son, Green, who was an employee of the defendant and against whose death from bodily injury the defendant was insured for £1,000, was killed as a result of a fire on the defendant's premises. No action on the insurance policy ensued because the defendant paid over the money received under the policy to the plaintiff. However, the plaintiff did sue under the Fatal Accidents Acts, 1846–1908, and the question then arose as to whether the money paid over under the policy must be deducted from the damages to be recovered in this action. It was quite clear that it was a benefit derived by the plaintiff arising out of her son's death and would therefore have to be brought into account unless the plaintiff could rely on section 1 of the Fatal Accidents (Damages) Act, 1908, which provides:

> "In assessing damages in any action, whether commenced before or after the passing of this Act, under the Fatal Accidents Act, 1846, as amended by any subsequent enactment, there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of the Act." [27a]

As Professor Unger [28] has pointed out, this section was enacted at a time when the practice of taking out group policies on behalf of their employees had not been developed by employers. It seems, at the least, highly probable that the draftsman had in the forefront of his mind the situation in which the deceased had taken out a policy on his own behalf and in which the existing law appeared to put a premium on improvidence. But, be that as it may, the draftsman failed to use words which clearly limited the operation of the section to that situation, and different situations have now arisen in which "section 1 leaves something to the imagination." [29]

[26] See, *e.g.*, Davis, *Law Relating to Commercial Letters of Credit*, 57–69; Gutteridge and Megrah, *The Law of Banker's Commercial Credits*, 14–26; and *cf.* Steffen [1958] J.B.L. 438.

[27] [1959] 2 Q.B. 226; [1959] 2 All E.R. 525.

[27a] The 1908 Act has now been repealed by the Fatal Accidents Act, 1959, s. 2 of which lays down a new formula for the benefits to be excluded from consideration. For comment see Kahn-Freund and Unger, 23 M.L.R. 60.

[28] 22 M.L.R. 96, 519. See also Hamson [1959] C.L.J. 153.

[29] *Per* Romer L.J. [1959] 2 Q.B. at p. 243; [1959] 2 All E.R. at p. 533.

It seems that at least four possible interpretations may be given to the section:

(a) The section may be confined to policies taken out by the deceased on his own behalf. As we have already observed, this was probably the main purpose of the section, but it is a familiar legal phenomenon that a reform may have an operation wider than the defect it sought to remedy. To limit the section in this way would require a somewhat cavalier treatment of the actual wording and this approach was rejected in *Bowskill* v. *Dawson*.[30]

(b) That policies taken out by someone other than the deceased but which the deceased has a legal or equitable right to enforce need not be brought into account. If this view were taken, the court would have to decide whether the particular policy in question conferred such a right. In fact, however, although both Ashworth J.[31] and the Court of Appeal considered the enforceability of the insurance policy by the plaintiff's son, they thought that the section must receive a still wider meaning. They were not agreed as to what that meaning was, although in the particular circumstances of the case this did not affect the result.

(c) The widest view was that taken by Ashworth J. and Pearce L.J., which may be called the "label" view. On this view the words "paid or payable on the death of the deceased under any contract of assurance" merely served as a label of the sum of the money which was not deductible, and it mattered not to whom the money was payable under the policy of assurance, although of course no problem could arise unless the money actually reached the hands of the plaintiff.

(d) View (c) has an attractive simplicity and on a literal reading of the section there seems much to be said for it. It did not, however, commend itself to Hodson and Romer L.JJ. who took a view of the section midway between (b) and (c). They rejected the "label" interpretation because they thought it would lead to great complications and difficulty where for example the court was invited to "trace" a "labelled" sum through a succession of hands or where a "labelled" sum was retained by the payee for many years and then left as a legacy to the plaintiff. On the other hand they did not think it necessary for the plaintiff to show that he had an enforceable right to the insurance money because the section extended to the case where "sums are received by an employer under a scheme which was designed for the benefit of the employees, but without

[30] [1955] 1 Q.B. 13; [1954] 2 All E.R. 649.
[31] [1959] 1 Q.B. 28; [1958] 3 All E.R. 44.

conferring any enforceable right on them, and he pays the sums over to the estates or dependants of the men when the risk matures "[32] and this was such a case.

Although, on the facts of this particular case, interpretations (c) and (d) produced the same result, it is clear that there may be cases where they produce a different result and the *ratio decidendi* of the decision of the Court of Appeal would clearly appear to be that (d) is the correct interpretation. It is not proposed to canvass these interesting differences of opinion further since for our present purposes they are immaterial. Once it was established that (b) was not the correct solution, it became unnecessary for the court to decide whether Green had an enforceable right under the policy and it is submitted that any observations on this subject must necessarily be *obiter dicta*, since a finding that Green could not enforce the policy could not possibly be a reason for a decision that the plaintiff was not bound to bring money received under the policy into account.

This is by no means to argue that the views of the court on the subject can be lightly dismissed. In view of the possibility that (b) might be held the correct interpretation the plaintiff was constrained to argue that Green had a legal or equitable right to enforce the policy and though in the event it was unnecessary to decide this, the question was fully considered and pronounced upon. The plaintiff's argument that Green had a right to enforce the policy rested on two alternative contentions.

It was argued that Green had a right enforceable in equity because Russell had constituted himself a trustee of the policy for Green. As we have already pointed out, the courts have in recent years been very reluctant to accept a contention of this kind,[33] and although it was held that the policy was taken out for the benefit of Green,[34] both Ashworth J. and the members of the Court of Appeal were content to cite *Re Schebsman*[35] and *Vandepitte's* case[36] as showing that a good deal more was required before a trust was inferred and to point out that the facts fell a good way short of those which in *Bowskill* v. *Dawson*[37] were held to evidence a trust. On the authorities this result would appear inevitable. No doubt it is still open to the House of Lords to reconsider this line of cases and their relation with *Walford's* case[38] but lower courts can hardly be expected to do so.

Much more significant for our present purposes was the plaintiff's reliance on Denning L.J.'s enunciation of a right to sue at

[32] [1959] 2 Q.B. at p. 244; [1959] 2 All E.R. at p. 533.
[33] *Supra*, note 1.
[34] *Per* Romer L.J. [1959] 2 Q.B. at p. 244; [1959] 2 All E.R. at p. 533.
[35] [1944] Ch. 83.
[36] [1933] A.C. 70.
[37] [1955] 1 Q.B. 13; [1954] 2 All E.R. 649.
[38] [1919] A.C. 801.

common law in *Smith* v. *River Douglas Catchment Board*[39] and *Drive Yourself Hire Co. (London), Ltd.* v. *Strutt.*[40] On this difficult and controversial point Ashworth J. preferred "to take refuge in silence,"[41] but it was fully considered by Romer L.J., with whom Hodson L.J. agreed throughout and Pearce L.J. agreed on this point. Romer L.J. rejected Denning L.J.'s view on two counts: first, that in reviewing the earlier authorities he had made no reference to *Bourne* v. *Mason*[42] and *Price* v. *Easton*[43] so that the historical accuracy of his exposition of the law prior to *Tweddle* v. *Atkinson*[44] was in doubt[45]; and, secondly, that in any case, whatever the history of the matter, the question was concluded against the plaintiff by the decision of the House of Lords in *Dunlop* v. *Selfridge.*[46]

At first sight this decision would seem to mark the close of another chapter in this tangled story. On closer examination, however, it would seem that this is not so, even apart from any argument that Romer L.J.'s remarks are as much *obiter* as those of Denning L.J. On the facts there were only two possible exceptions to the doctrine of privity of contract which could have availed Green: the trust concept and section 56 of the Law of Property Act, 1925. We have already seen that the Court of Appeal rejected the applicability of the former, but the latter possibility was not before the court because the plaintiff did not rely on it.[47] The plaintiff's reluctance to rely on the section is not easy to understand; it may well be that the Court of Appeal would not have regarded it as applicable to a situation of this kind, but it would seem that the only way, if at all, in which Denning L.J.'s views can be supported in this type of case is by reliance on the section. It is respectfully submitted accordingly that by failing to rely on the section the plaintiff made it certain that the Court of Appeal would find against the existence of any right to sue at common law and thus deprived the case of most of its legal interest on this point.

It may be permissible to speculate on the chances of the plaintiff relying successfully on section 56. The predominant academic opinion is that the section does not have the fundamental effect which has been ascribed to it by Denning L.J. However, Mr. Elliott[48] has subjected this view to searching scrutiny and has suggested that this is by no means the most obvious interpretation and that the authorities are by no means as decisively against a wide interpretation of the section as has sometimes been suggested.

[39] [1949] 2 K.B. 500; [1949] 2 All E.R. 179.
[40] [1954] 1 Q.B. 250; [1953] 2 All E.R. 1475.
[41] [1959] 1 Q.B. at p. 44; [1958] 3 All E.R. at p. 51.
[42] (1669) 1 Vent. 6.
[43] (1833) 4 B. & Ad. 433.
[44] (1861) 1 B. & S. 393.
[45] Romer L.J. referred to *Chitty on Contracts* (21st ed.), Vol. I, at p. 62. The same point was made by E.J.P., 70 L.Q.R. 467.
[46] [1915] A.C. 847.
[47] *Per* Romer L.J. [1959] 2 Q.B. at p. 240; [1959] 2 All E.R. at p. 530.
[48] 20 *Conveyancer* 43, 114.

Thus the oft-quoted statements of Simonds J. and Sir Wilfred Greene M.R. in *White* v. *Bijou Mansions*[49] would mean no more, properly construed, than that the section would not enable a person not a party to a covenant to insist on its performance, merely because it would be convenient for him if it were performed, unless he could show in addition that the covenanting parties covenanted for his benefit. In the case of land, most of the decided cases fall very clearly on one side or other of any line that could possibly be drawn, being either so strong that they would fall within the section on even the narrowest reading[50] or so weak that they would fall outside it on the widest reading.[51] The main obstacle in the authorities to a wide reading of the section consists in a series of cases dealing with life insurance policies, for the benefit of parties outside the scope of section 11 of the Married Women's Property Act, 1882, and analogous arrangements.[52] These cases were all decided at first instance and there seems to be much in favour of Mr. Elliott's contention that the narrow effect given to section 56 was only achieved at the cost of some violence to the accepted rules of statutory interpretation. It is unfortunate therefore that the Court of Appeal was not invited to review them.

The section has recently been revisited by Mr. Andrews.[53] He makes a distinction between deeds and simple contracts. In the case of deeds the section extends the effect of its predecessor, section 5 of the Real Property Act, 1845, from realty to personalty. Mr. Andrews rejects[54] the view which had previously been put forward[55] that the *inter partes* rule did not apply to personalty, so that the section would on this view involve a change in the law here. We need not pursue this point; what is of more immediate interest are Mr. Andrews' views on the effect of section 56 on simple contracts. He argues that the words of the section are apt to nullify the doctrine of privity of contract but that in the case of simple contracts this would not enable a third party beneficiary to sue because he would have to clear another hurdle, *viz.*, the rule that consideration must move from the promisee. The section, it is urged, might make the third party a party to the contract, but this would not help him for he would be a party who could not sue because he had given no consideration.

> "The mere fact that we treat him as a party to the contract will, of course, help him not at all. Party or not, he must as a promisee show that consideration has moved from him before he can succeed in his action, and in the majority

[49] [1937] Ch. 610; [1938] Ch. 351.
[50] *Re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch. 430; *Stromdale and Ball, Ltd.* v. *Burden* [1952] Ch. 223.
[51] *White* v. *Bijou Mansions* [1937] Ch. 610; [1938] Ch. 351.
[52] *Re Sinclair's Life Policy* [1938] Ch. 799; *Re Foster* [1938] 3 All E.R. 357; *Re Miller's Agreement* [1947] Ch. 615.
[53] 23 *Conveyancer* 179. [54] *Ibid.* at p. 182.
[55] By Simonds J. in *White* v. *Bijou Mansions* [1937] Ch. 610, at p. 625, and by Grunfeld in 11 M.L.R. 224, at p. 227.

of cases he will have given no consideration for the defendant's promise." [56]

This is a striking and attractive argument. Its great attraction is that it appears to satisfy the psychological compulsion to give the section a narrow effect, without doing violence to the wording. Other narrow interpretations of the section have had to rely on shadowy hypotheses as to the intention of the legislature, whereas Mr. Andrews appears to give full effect to what the statute says. It is respectfully submitted, however, that it is possible to meet these arguments and continue to support a wide view of the section.

In the first place Mr. Andrews' interpretation finds no support in the authorities. This is by no means decisive, for the point was not argued in any of them and it is indeed essential for those who support a wide interpretation of the section to argue that the matter is not foreclosed by the authorities.[57]

Even if it be conceded that Mr. Andrews is correct in distinguishing in simple contracts between the doctrine of privity of contract and the rule that consideration must move from the promisee, the application of this distinction to the section involves imputing curious intentions to the legislature. It seems inconsistent to argue that the words of the section mean what they appear to say when dealing with the doctrine of privity, so that a case like *Re Miller's Agreement*,[58] where the agreement was under seal, was wrongly decided, but to contend at the same time that, although the section in talking of "other instruments" appears to contemplate its application to documents not under seal, it fails to have any application in that field, because Parliament omitted to deal with the rule that consideration must move from the promisee. This would mean that in a case like *Stromdale & Ball, Ltd.* v. *Burden*,[59] which appears to fall precisely within the section on a narrow view, a distinction must be drawn between the grant of an option under seal and in an unsealed document. Again this argument is not decisive because it may well be contended that to speculate about legislative intention in regard to this section is totally unrealistic.

It is submitted, however, that Mr. Andrews' argument would fall to the ground if it could be shown that there was no difference in the case of a simple contract between the doctrine of privity and the rule that consideration must move from the promisee. If the two rules are really one, it would follow that a person could only be a party to a simple contract where he had given consideration, and accordingly, a statutory provision that a person is to be treated as a party must mean that he is to be treated as having given consideration. It is submitted that in fact the two rules are

[56] 23 *Conveyancer* at p. 192.
[57] See *supra*.
[58] [1947] Ch. 615.
[59] [1952] Ch. 223.

identical,[60] but since this contention is contrary to the commonly accepted view it demands fuller consideration.

The prevailing view is that the two rules are separate, although in many circumstances they overlap.[61] This seems to be one of the more unfortunate legacies of comparative law. When English lawyers discovered that Continental systems of law which knew nothing of consideration nevertheless had the rule that a contract could only benefit and bind the parties, they assumed that this must be a fundamental characteristic of a contract and promptly transferred it to English law although the situation was already provided for. It has been felt necessary to justify this dichotomy by giving illustrations of cases where the two rules do not overlap.[62] Thus it is said that if "by the terms of a joint agreement, A promises B and C to pay C £100 if B will carry out work desired by A, C is a contracting party, but he cannot sue A, because B alone has given consideration for A's promise." With respect, this view is not completely convincing. In English law a contract is not a mere promise but a promise supported by consideration, or, in modern rationalisation, a bargain. If A were to promise C to pay him £100 *simpliciter*, we should not say that there is a contract but that C cannot enforce it because he has not given consideration.[63] We should simply say that there is no contract.[64] To do otherwise is to deprive the word contract of any legal meaning.[65] Similarly a promise to C to pay him £100 if B carries out work is not a contract but a mere gratuitous promise. It is not easy to see why when we do not describe a gratuitous promise to C as a contract, we should suddenly describe it as a contract, albeit one C cannot enforce, because B has bargained for and bought the same promise. If C is not a party to the bargain he is not a party to the contract.

[60] Mr. Andrews seems to have leanings towards this view. Thus at p. 188: "This latter principle we commonly refer to as the rule requiring privity of contract. In truth this is not a fundamental principle of our common law. As a rule it has no great history. In fact it is a modern and largely academic rationale for a group of cases running from *Bourne* v. *Mason* to *Tweddle* v. *Atkinson* that were decided wholly on the principle that consideration must move from the promisee"

[61] See, *e.g.*, Cheshire and Fifoot, 5th ed., p. 66; Anson, 21st ed., pp. 86, 349. *Cf.* Salmond and Williams, 2nd ed., pp. 99–100.

[62] See the Sixth Interim Report of the Law Revision Committee at p. 22 and *supra*, note 61.

[63] *Pace* Mr. Andrews, who seems to flirt with the contrary view at the bottom of p. 191.

[64] This argument postulates that the doctrine of consideration, despite its occasional over-refinements, represents the acceptance by English law of a law of contract based on the bargained-for exchange. This fundamental assumption cannot be debated here but it would seem that alternative bases, such as the inherent moral force of promises, may be ignored for present purposes since they offer much less doctrinal resistance to the *jus quaesitum tertio* by way of contract.

[65] It is true that we use the word contract in cases where there is no bargain, *e.g.*, contract of record, contract under seal, but these are historical anomalies outside the scope of this argument. Again, one talks of void contracts, voidable contracts, etc., but these are all cases where there is at least a simulacrum of a bargain, although it does not receive full legal effect. In all these cases, too, we qualify the word "contract"; if we speak of a contract *simpliciter* we mean a bargain.

A converse case is sometimes put. A promises B to pay C £100 if C does work. It is said that if C does the work he cannot recover because, although he has furnished consideration, he was not a party to the contract. This analysis again is not completely convincing. If C does the work in ignorance of the offer he would seem not to provide consideration, because although he has no doubt suffered a detriment, the detriment is not causally connected with the offer. This is clearly the case where there are only two parties. Thus, for example, in *Wigan* v. *English and Scottish Law Life Assurance Assn.*[66] one Hackblock had a life assurance policy for £5,000 which was to be void if the assured died by his own hand "but without prejudice to the bona fide interests of third parties based on valuable consideration." He owed Wigan, who was pressing for payment, over £5,000 and executed an assignment to him of the policy, which was to be revealed in negotiations if necessary. In fact Wigan forebore without the assignment being revealed, and Parker J. held that there was no consideration because, although the assignment had been executed with the object of obtaining further time and further time had in fact been obtained, it had not been obtained in exchange for the assignment. The presence of a third party may obscure but should not confuse the issue. Even if C knew of the promise when he acted there would not strictly be consideration unless the offer was addressed to him. It might well be, however, that the court would infer from the express promise to B an implied offer to C of £100 for his doing the work—a unilateral contract.

There does not seem to be any binding authority against this view. *Corney and Curtis* v. *Colidon*[67] is too poorly reported to be of much assistance. No doubt *obiter dicta* can be found which treat the principles as separate, notably those of Lord Haldane in *Dunlop* v. *Selfridge*,[68] but it does not appear that these remarks have ever had any practical effect. Indeed, if the above contentions are correct, the question is one which never can arise in practice.

It is submitted, therefore, that there is no difference in the English law of simple contracts between the doctrine of privity of contract and the rule that consideration must move from the promisee. If this is so, it would seem to be open to a court to hold that a statute, which purports to dispense with one rule, in fact dispenses with both. If section 56 was not to be applied in a case like *Green* v. *Russell*[69] it must be on the grounds that *Re Sinclair's Life Policy*,[70] *Re Foster*[71] and *Re Miller's Agreement*[72]

[66] [1909] 1 Ch. 291.
[67] (1674) 1 Freem.K.B. 284.
[68] [1915] A.C. 847.
[69] [1959] 2 Q.B. 226; [1959] 2 All E.R. 525.
[70] [1938] Ch. 799.
[71] [1938] 3 All E.R. 357.
[72] [1947] Ch. 615.

were correctly decided; it is to be regretted that the Court of Appeal in *Green* v. *Russell* [73] were not invited to decide whether this was so.

Midland Silicones, Ltd. v. Scruttons, Ltd.

Only a fortnight before the Court of Appeal delivered judgment in *Green* v. *Russell*,[73] Diplock J. in *Midland Silicones, Ltd.* v. *Scruttons, Ltd.*[74] had also expressed vigorous dissent from the views of Denning L.J. on privity of contract. The actual problem in this case, however, was very different from that in *Green* v. *Russell*. The plaintiffs were consignees and owners of a drum bought on terms c.i.f. London and consigned to them from America by ship. During the process of consignment the goods were handled by the servants of the defendants, who were a firm of stevedores acting as agents for the shipowners and, owing to the negligence of these servants, the drum was dropped and damage amounting to £593 12s. 2d. was caused. The plaintiffs could have sued the shipowners but if they had done so the liability of the shipowners would have been limited to $500 as the bill of lading incorporated section 4 (5) of the United States Carriage of Goods by Sea Act, 1936. The plaintiffs accordingly sued the defendant stevedores and the question therefore arose whether the defendants could take advantage of the limitation of liability in the bill of lading. Diplock J. held that they could not; he thought it contrary to principle that they should be able to do so and felt able to dispose of the authorities to the contrary.

Diplock J.'s judgment merits and demands the closest analysis, both for the force and clarity of the reasoning and for the intrinsic importance of the subject-matter. Exemption clauses have been a feature of contracts of carriage, both of goods and of passengers, for over a century. It often happens that persons other than the original contracting parties, such as servants or agents of the carrier or other carriers, are involved in the performance of such contracts. The availability of exemption clauses presents a problem of both academic and practical importance and has produced a substantial body of case law. It is curious that it receives surprisingly little attention from the standard textbooks. Thus Cheshire and Fifoot treat the answer as self-evident [75]:

> "Even if the excluding or limiting term is an integral part of the contract and even if its language is apt to meet the situation that has in fact occurred, it may be used only by the

[73] [1959] 2 Q.B. 226; [1959] 2 All E.R. 525.

[74] [1959] 2 Q.B. 171; [1959] 2 All E.R. 289. For other comments see Hardy-Ivamy, 22 M.L.R. 677; Guest, 75 L.Q.R. 312; Hamson [1959] C.L.J. 150.

[75] *Contract*, 5th ed., p. 112. The principal case cited is *Adler* v. *Dickson* [1955] 1 Q.B. 158; [1954] 3 All E.R. 497, where the contract did not in fact purport to protect the third party. *Cf. ibid.* p. 370, where the decision of Devlin J. in *Pyrene Co., Ltd.* v. *Scindia Navigation Co., Ltd.* [1954] 2 Q.B. 402; [1954] 2 All E.R. 158 is cited without criticism—that case was concerned with the burden of an exemption clause rather than the benefit.

> contracting party. No stranger may seek the shelter of its protection. The proposition is elementary and there seems no reason to deny its validity in the present context. The wonder, indeed, is not that it has been affirmed but that it should ever have been doubted."

Hanbury [76] regards this answer as not merely inevitable but sociologically desirable as affording a means of cutting down the scope of exemption clauses. Anson [77] considers the authorities more fully but comes to the same conclusion. Wilson,[78] on the other hand, appears to hold that a properly framed exemption clause can operate to exclude the liability of a stranger to the contract.

With all respect to those who hold the contrary proposition to be elementary, there would seem to be much to be said for the view that an exemption clause in a contract can benefit a person who is not a party to the contract. It is submitted that on a proper analysis the rule that a third party cannot sue to enforce a contract made for his benefit is irrelevant to this situation. It would seem to be invoked on the tacit assumption that because the exemption clause operates contractually between the parties to the contract, it must operate contractually, if at all, as regards third parties. This assumption is analogous to that which long vitiated the law as to dangerous chattels, *viz.*, that because a vendor was under a contractual duty to a purchaser, he could not owe a duty to any person who was not in a contractual relationship with him.[79]

As between the original parties to a contract containing an exemption clause there are usually alternative causes of action in tort and contract—although the distinction is of little practical importance since the exemption clause, if effective at all, will usually be equally effective to exclude liability under either head of claim. The juridical nature of the exclusion, however, is somewhat different: as far as the claim in contract is concerned the exemption clause is an integral part of the contract so that its operation involves the true construction of the contract; the relevance of the exemption clause to a claim in tort is to enable the defendant to set up the defence of *volenti non fit injuria*. When the defendant is a stranger to the contract it follows *a fortiori* that the claim against him must be in tort, if at all, and that he is seeking to use the exemption clause to support a plea of *volenti*. Since the basis of *volenti* is consent and not contract, there seems

[76] *Modern Equity*, 7th ed., p. 69.

[77] *Contract*, 21st ed., pp. 159–161.

[78] *Contract*, 1st ed., pp. 250–251. *Cf. Street on Torts*, 2nd ed., p. 167, note 3, who would appear to hold that *Adler* v. *Dickson* is to be regarded as an example of the tendency to construe exemption clauses very strictly. Fleming, *Torts*, 1st ed., p. 235, note 20, says the question is difficult.

[79] *Winterbottom* v. *Wright* (1842) 10 M. & W. 109, as interpreted in subsequent cases. See Heuston, 20 M.L.R. 1 at p. 10. See also *Cavalier* v. *Pope* [1906] A.C. 428.

no reason why such a plea should not succeed in appropriate cases. It is true that the defendant is not a party to the contract and could not enforce it as such, but he is not seeking to do so. He is merely relying on the contract to show that the plaintiff has voluntarily assumed the risk and since he could do this without having to prove a contract at all, there seems no reason why a contract between the plaintiff and another party should not serve equally well.

The matter may be tested by considering some hypothetical cases.

(i) A goes for a ride in B's sports car. Before getting into the car A says to B "I know you are a dangerous and reckless driver but I take my chance on that." B drives recklessly and has an accident in which A is injured. Surely A is *volens*?

(ii) A goes for a ride in B's sports car. Before getting into the car A says to C, a bystander, "I know B is a dangerous and reckless driver but I take my chance on that." B drives recklessly and has an accident in which A is injured. Again surely A is *volens*?

(iii) The facts are the same as in (ii) except that A has actually made a contract with C purporting to exempt B from all liability for dangerous and reckless driving. Surely this cannot be a weaker case than (ii)? The contract is a mere red herring, except in so far as it affords excellent evidence that A is *volens*.

The only objection to this argument would be if it could be shown that the defence of *volenti* could only arise where there was a contract between plaintiff and defendant that the plaintiff would take the legal risk of the defendant's acts. The defence has been much restricted in recent years,[80] but though dicta can be found talking in terms of agreement [81] it is conceived that it is not necessary to show a contract between the parties. This is the view to which Dr. Glanville Williams is inclined. He writes [82]:

> "Thus a rule is conceivable that consent may be given by an infant, at any rate if he is nearly of age, although a contract to the effect might not be binding on him as a contract because of his infancy. It seems that there is no need to inquire into the existence of consideration for the agreement, though consideration would be present in the great majority of cases."

It is true that *Olsen* v. *Corry* [83] is slightly against this view. In that case the plaintiff sued the defendant for negligence. It was contended that liability was excluded by an exemption clause included in the apprenticeship deed entered into by the plaintiff, an infant. Greaves-Lord J. held that the deed was void as not being

[80] Glanville Williams, *Joint Torts and Contributory Negligence*, Chap. 12.
[81] *Ibid.* p. 310, note 4.
[82] *Ibid.* p. 312, though *cf.* at pp. 315–316 where he does not deal with the applicability of this idea to the particular case of third parties.
[83] [1936] 3 All E.R. 241; 155 L.T. 512; criticised by Dr. Williams, *ibid.* 312, note 11.

for the infant's benefit and in rejecting an alternative defence of *volenti* he did not consider the deed. But this case is at most *sub silentio* authority against the view here contended for, and the Privy Council in *Vita Food Products Inc.* v. *Unus Shipping, Ltd.*[84] seem to have taken a different view. In that case goods were shipped from Newfoundland to New York on a ship which ran aground in Nova Scotia owing to the negligence of the captain. The bill of lading under which the goods were shipped did not comply with the Newfoundland Carriage of Goods by Sea Act, 1932, and it was contended that accordingly the contract was illegal and that the shipowners were therefore unable to rely upon exemptions contained in the bill of lading. The major part of the advice of the Board was concerned with the effect of a provision in the bill that "this contract shall be governed by English law," and it was held that this operated to prevent the contract being illegal, there being nothing improper in the bill of lading in the eyes of English law. The Board also dealt briefly with the position if the contract were illegal, and was of the opinion that this would not prevent the exemption clauses having effect "either because it (the plaintiff) was party to an illegality avoiding the contract or alternatively because the contractual exemptions could not be ignored."[85] This Delphic utterance tends to support the contention here made that what is ineffectual as a contract may still operate by way of consent.

It is not, of course, submitted that every contract between A and B which contains an exemption clause can suffice to show that A is *volens* as regards C's tortious conduct. The mere fact that A is prepared to take his chance as regards B is equivocal as regards C. If C is to succeed in a defence of *volenti*, he must show that A has voluntarily assumed the risk as regards him. The most satisfactory way in which this can be done is an express term in the contract, but there seems no legal reason why such a term could not be implied where the ordinary rules of construction demand the implication of a term.

It may be objected that this line of argument will tend to widen the scope of exemption clauses and that this is a development to be avoided.[86] It can be argued that where the consent is embodied in a standard form contract it is of a somewhat illusory character. It is true that in recent years the courts have manifested an unfriendly attitude towards wide exemption clauses by construing them *contra proferentem* and by the use of such devices as the fundamental term, but such methods have always conformed, at least in form, to established principles. There may be a case for abandoning established principles in this field and declaring outright that wide exemption clauses are void as contrary to public

[84] [1939] A.C. 277.
[85] At p. 301.
[86] See Hanbury, *op. cit.*

policy, but this course has clearly not been adopted. If we continue to permit exemption clauses between the contracting parties it is capricious to deny them effect elsewhere unless some clearly established principle leads to that result. It is submitted that there is no such principle.

It may be not merely illogical to deny an exemption clause effect as regards a third party but positively unsatisfactory. Thus if A an employer purports in a contract with C to exempt both himself and B his servant from the consequences of their negligence, there may be good policy reasons for striking down the exemption clause *in toto*, but to treat it as effective to exclude A's liability but not B's would be to fix liability on the person least able to bear it. It is true that in the light of *Lister* v. *Romford Ice and Cold Storage Co.*[87] this would not be a decisive argument if accepted legal rules led to that result. But if they do not, the result should give pause to those who wish to alter them.

Furthermore it cannot really be argued that all exemption clauses are objectionable. While some exemption clauses are misuses of legal power, others are more properly regarded as attempts to avoid the risks of litigation by fixing the incidence of loss in advance. The clause in *Midland Silicones Ltd.* v. *Scruttons Ltd.*[88] itself was of this nature; it merely incorporated a provision of the Hague Rules, which have been approved by the legislatures of most of the great shipowning states. As between the contracting parties it cannot possibly be argued that there was any policy reason against giving effect to the clause.

It must be confessed that the view that a contract between A and B can serve to provide a defence of *volenti* to C in an action by A does not appear very explicitly in the authorities. Nevertheless there is a good deal of authority reaching the same route although the reasoning on which the authority is based is not always clear. In *Midland Silicones Ltd.* v. *Scruttons Ltd.*[89] Diplock J. either explained or rejected the authority and thought that such a result could not be justified on principle. He observed: "I myself think that the present case is governed by the simple, fundamental, though no doubt old-fashioned, principle laid down by Lord Haldane and approved by the House of Lords in *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.* and that the defendants cannot limit their liability to the plaintiffs in tort by relying on a contract between the plaintiffs and a third party to which they were not parties, and for which they gave no consideration to the plaintiffs."[90]

It has already been suggested that this result is not in fact dictated by principle. In this particular case it would seem, however, that the same result might follow from the application of the

[87] [1957] A.C. 555.
[88] [1959] 2 Q.B. 171; [1959] 2 All E.R. 289.
[89] [1959] 2 Q.B. 171; [1959] 2 All E.R. 289.
[90] [1959] 2 Q.B. at p. 192; [1959] 2 All E.R. at p. 299.

principles suggested above. The contract between the plaintiffs and the shipowners certainly did not expressly purport to exclude the liability of the defendants.[91] This is not in itself decisive as consent may be implied as well as expressed, but in view of the reluctance of the courts to give a wide effect to the principle of *volenti* an express extension of the exemption to the defendants would have been of great assistance to them. The real question to be decided in the case was therefore whether, from the fact that the plaintiffs had consented to the limitation of the shipowner's liability, it could be implied that they equally consented to the limitation of the liability of anyone engaged by the shipowners in performance of the contract. If they did not so consent, it follows *a fortiori* that no question as to the effect of the consent could arise. This vital question became obscured, however, because the defendants framed their argument in terms of Scrutton L.J.'s dictum in *Mersey Shipping & Transport Co., Ltd.* v. *Rea*[92] that:

> "where there is a contract which contains an exemption clause, the servants or agents who act under that contract have the benefit of the exemption clause. They cannot be sued in tort as independent people, but they can claim the benefit of the contract made with their employer on whose behalf they were acting."

This statement makes no mention of consent but derives the immunity from the relation between the defendants and one of the contracting parties; no doubt it might be argued that in order to give the exemption clause business efficacy it must be extended to the servants or agents of the exempted party but this would surely be a question of fact to be decided in the light of the particular circumstances. It may well be that Scrutton L.J.'s statement was too wide, but it by no means follows that third parties can never take advantage of exemption clauses.

The problem first arose in the nineteenth century, in relation to railway transport.[93] It often happened that goods or passengers were carried over the lines of more than one railway and problems arose as to whether exemption clauses extended to cover the whole journey. In this context the problem was solved by wide implications of agency, but this was somewhat unreal as the ticket-issuing company was treated indifferently as the passenger's agent to contract with the other carriers and vice versa.[94] The result is consonant with principle; in the circumstances of those cases it would have been unrealistic to treat the passenger's legal position as

[91] See [1959] 2 Q.B. at p. 182; [1959] 2 All E.R. at p. 293.

[92] (1925) 21 Ll.L.R. 375, at p. 378—though junior counsel for the defendants was the editor of Carver's *Carriage of Goods by Sea*, 10th ed., where at p. 1004 Scrutton L.J.'s views are rejected as "plainly untenable" and a conclusion similar to that here advocated is arrived at, but by a different route.

[93] For a minute review of the earlier authorities see Treitel, 18 M.L.R. 172.

[94] *Cf. Hall* v. *N.E. Ry.* (1875) L.R. 10 Q.B. 437; and *Baratt* v. *G.N. Ry.* (1904) 20 T.L.R. 175.

infinitely variable according to the piece of line on which he was travelling. If he consented to excuse the ticket-issuing railway, it was reasonable to treat him as excusing all others. It must be admitted, however, that the agency exception was narrowly construed in *Cosgrove* v. *Horsfall*.[95] In that case the L.P.T.B. issued to the plaintiff, one of their bus-drivers, a free pass subject to a condition that—except when he was travelling on the company's business—neither the company nor their servants would be liable to him "for loss of life, injury, or delay, or damage to property however caused." The plaintiff was injured and sued the servant who was responsible for the injury. The Court of Appeal held that the defendant could not avail himself of the exemption clause, since he was not a party to the contract nor were the L.P.T.B. acting as his agents. This is a clear authority against the view here contended for. But that view was not put to the court, who considered the problem exclusively in contractual terms, nor was the important case of *Elder Dempster* v. *Paterson, Zochonis & Co.*[96] cited to the court.

In that case the plaintiffs had shipped a cargo of palm oil and palm kernels from West Africa to England under a contract of carriage with the first defendants, who had chartered the ship from the second defendants. The contract of carriage provided that the charterers were to be liable for unseaworthiness but not for bad stowage. The palm kernels were loaded on top of the palm oil and crushed the casks in which the palm oil was contained. The speeches in the House of Lords were almost entirely concerned with whether this was due to unseaworthiness or bad stowage. The majority held that it was due to bad stowage and that accordingly the charterers were protected by the exemption clause. The plaintiffs contended that even if this were so the shipowners were not protected by the exemption clause as they were not parties to the contract. Their lordships unanimously rejected this contention but unfortunately in so brief a manner that it is not at all easy to see precisely why they did so. The actual result of the case can be explained on at least three grounds:

(i) The principle of vicarious immunity stated by Scrutton L.J. to be the *ratio* of the case.[97]

(ii) That the shipowners had actually become parties to the contract between the plaintiffs and the charterers. Diplock J. thought that these two views were taken only by Lords Cave and Carson and were accordingly not part of the *ratio* of the case. He particularly rejected theory (i) as not binding on him in the light of later authority.

[95] (1945) 62 T.L.R. 140.
[96] [1924] A.C. 522.
[97] *Mersey Shipping and Transport Co., Ltd.* v. *Rea* (1925) 21 Ll.L.R. 375, at p. 378.

(iii) That the plaintiffs impliedly assented that the shipowners would carry the goods on the same terms as the charterers. This was the view apparently taken by Lords Carson, Dunedin, Finlay and Sumner and preferred by Diplock J., who, however, referred to it as the "implied contract" theory. A contract was not actually spelled out by the members of the House of Lords and it seems unnecessary to do so. It was enough to hold that the circumstances of the case were such as to make the implication of consent essential. Thus Viscount Finlay observed [98]: "It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading in respect of all stowage, by suing the owner of the ship in tort." A different result could be justified in the instant case on the ground that the implication of consent was not irresistible because the circumstances were different from the *Elder Dempster* case,[99] in particular in that the plaintiffs never bailed the goods to the defendants nor invited them to deal with them.

It would seem, therefore, that there is nothing in the *Elder Dempster* case inconsistent with the view contended for in this paper and that the result in the *Midland Silicones* case is consistent with this view. In the one case the plaintiffs must be taken to have impliedly assented, in the other not to have done so. The views of Scrutton L.J. in so far as they predicate that the servants or agents of the exempted party must always be treated as within the benefit of the clause must be rejected.

It would seem, however, that Diplock J. would have come to the same conclusion even if it had been possible to imply that the exemption clause was made for the benefit of the defendants. For this purpose he relied on the doctrine of privity of contract and rejected Denning L.J.'s deviations from it in *Smith* v. *River Douglas Catchment Board*,[1] *White* v. *John Warwick & Co., Ltd.*,[2] and *Adler* v. *Dickson*.[3] In so far as his comments were addressed to Denning L.J.'s theory of third-party rights in general, they are similar to those of the Court of Appeal in *Green* v. *Russell*,[4] and it has already been suggested that this controversy is irrelevant to the present issue. The only one of these cases which calls for further comment is *Adler* v. *Dickson*.[5] In that case the plaintiff was a passenger on a ship of the P. & O. Navigation Co., and had been issued with a ticket which exempted the company from liability for the negligence of their servants. The plaintiff was injured and sued the master and boatswain of the ship, who raised a preliminary point of law that they were entitled to the protection of the exemption clause. The Court of Appeal held that they were not, as the clause neither

[98] [1924] A.C. at p. 548.
[99] See esp. [1959] 2 Q.B. at p. 188; [1959] 2 All E.R. at p. 296.
[1] [1949] 2 K.B. 500; [1949] 2 All E.R. 179.
[2] [1953] 1 W.L.R. 1285; [1953] 2 All E.R. 1021.
[3] [1955] 1 Q.B. 158; [1954] 3 All E.R. 397.
[4] [1959] 2 Q.B. 226; [1959] 2 All E.R. 525.
[5] [1955] 1 Q.B. 158; [1954] 3 All E.R. 397.

expressly nor by necessary implication purported to exempt them. The result was perfectly consistent then either with an insistence on privity of contract or an analysis of the problem in terms of *volenti*. It was not consistent with Scrutton L.J.'s theory of vicarious immunity, unless one were prepared to make a further distinction between carriage of goods and carriage of passengers. The Court of Appeal were not agreed as to what the result would have been if the exemption clause had expressly or by necessary implication exempted the defendants, though this discussion was necessarily *obiter*. Jenkins and Morris L.JJ. thought that the doctrine of privity of contract would operate to exclude the exemption clause; Denning L.J. thought otherwise. He accepted Scrutton L.J.'s explanation of the cases on carriage of goods,[6] and explained its relation to his general views on third-party contracts by saying that in these cases, although the contract was not made expressly for the benefit of the third parties, it was by necessary implication so made. He thought that the same principle was applicable in the case of passengers, although in such cases it was more difficult to infer assent. Diplock J. also rejected these views as he was entitled to do, since they were clearly *obiter*. Nevertheless there is much to be said for the end result at which Denning L.J. arrived although it was unnecessary to formulate this result in terms of a third party enforcing a contract made for his benefit.

Finally, Diplock J. fortified himself in the result at which he arrived by reference to the very recent decision of the United States Supreme Court in *Herd & Co.* v. *Krawill Machinery Corpn.*[7] and of the High Court of Australia in *Wilson* v. *Darling Island Stevedoring & Lighterage Co. Ltd.*[8] In his judgment, however, he did not examine these cases in detail and though they support the result at which he arrived, it is submitted that they do not support all his reasoning.

The facts in *Herd & Co.* v. *Krawill Machinery Corpn.*[9] were very similar to those in the *Midland Silicones* case.[10] The respondents (plaintiffs) had sold goods to a Spanish company and made a contract with carriers for them to be carried to Valencia. The goods were handled by the petitioners (defendants), an independent firm of stevedores, and damaged owing to their negligence. The respondents sued the petitioners for negligence and the latter contended that they were entitled to limit their liability to $500 as the carriers were entitled to do, because they were within the protection

[6] [1955] 1 Q.B. at p. 181; [1954] 3 All E.R. at p. 401.

[7] Judgment in this case was delivered the day before argument began and eight days before Diplock J. delivered judgment, at which time the case had not yet been reported—a fair indication of the topicality of the problem involved. The case is now reported at 359 U.S. 297 and at [1959] 1 Lloyd's Rep. 305.

[8] (1956) 95 C.L.R. 43.

[9] 359 U.S. 297; [1959] 1 Lloyd's Rep. 305.

[10] [1959] 2 Q.B. 171; [1959] 2 All E.R. 289.

either of section 4 (5) of the United States Carriage of Goods by Sea Act or of the parallel provisions of the bill of lading.

The unanimous opinion of the Supreme Court was delivered by Whittaker J. The court found that the Act did not expressly limit the liability of stevedores and that there was nothing in its language or legislative history to indicate any intention to limit the liability of stevedores. Similarly the same clause when it occurred in the bill of lading did not expressly limit the liability of the stevedores and there was nothing in the dealings between the contracting parties to indicate that it was intended to do so. It followed that the stevedores could only escape by invoking Scrutton L.J.'s principle of vicarious immunity; his principle had indeed been adopted by the majority opinion of the Fifth Circuit in *A. M. Collins & Co.* v. *Panama R. Co.*,[11] but the Supreme Court held that that case was wrongly decided and that a person could not take advantage of an exemption clause which was not made expressly or by necessary implication for his benefit. It follows that the decision supports Diplock J.'s refusal to accept the theory of vicarious immunity and his construction of the exemption clause as not being for the benefit of the stevedores. It does not support his views on the effect of the exemption clause if it were on its true construction made for the benefit of the stevedores. This point was not decided, but in so far as one can infer the court's opinion, it is contrary to that of Diplock J.

Thus it observed:

> "Contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries" [12]

and:

> "No statute has limited its (the petitioner's) liability, and it was not a party to nor a beneficiary of the contract of carriage between the shipper and the carrier, and hence its liability was not limited by that contract." [13]

These passages rather suggest that the stevedores could have availed themselves of the benefit of the exemption clause if it had been made for their benefit.

The facts of *Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.*[14] were similar. In this case goods were shipped to the plaintiff under a bill of lading which provided, *inter alia*, that:

> "the carrier has no responsibility whatsoever for the goods . . . subsequent to the discharge from the vessel. Goods in the custody of the carrier or his Agents or servants before

[11] 197 F. 2d 893.
[12] 359 U.S. at 305; [1959] 1 Lloyd's Rep. at p. 309.
[13] 359 U.S. at 308; [1959] 1 Lloyd's Rep. at p. 310.
[14] (1956) 95 C.L.R. 43. See Montrose, 20 M.L.R. 658; MacDougall, 5 Business L.R. 242.

> loading and after, whether being forwarded to or from the vessel or whether awaiting shipment, landed, or stored . . . are in such custody at the sole risk of the owners and the carriers shall not be liable for loss or damage arising or resulting from any cause whatsoever."

The goods were damaged owing to the negligence of the defendant stevedores and the plaintiffs sued for damages. The stevedores contended that they were entitled to the benefit of the exemption clause. The High Court of Australia held that they were not so entitled by a majority of three to two, overruling two earlier contrary decisions in New South Wales.[15]

The precise *ratio* of the cases, however, presents a nice jurisprudential problem because not merely was the court divided but the majority reached their conclusions by somewhat different routes.[16] The two judges in the minority (Williams and Taylor JJ.) thought that the *Elder Dempster*[17] case had established the principle of vicarious immunity stated by Scrutton L.J. and applied in the two earlier Australian cases.[18] This was, however, based on the presumed intent of the parties at least by Williams J. who observed[19]:

> "The principle . . . must surely be that the contract prescribes the conditions upon which the goods are placed in the possession of the carrier in order that he may perform the contract of carriage, that it is obvious that in order to perform that contract the carrier must employ servants, agents or independent contractors to carry out part of his duties, and that the true intent of the contract is that all persons engaged by the carrier to perform it should participate in the performance on the same basis as the carrier himself."

Such an interpretation of the contract would do less violence to established principle than the theory of vicarious immunity, but with respect it seems rather extravagant to hold that such exemption clauses must always as a matter of necessary implication extend to the servants or agents of the exempted party. On this point the construction of the U.S. Supreme Court in *Herd's* case[20] seems preferable.

In the particular contract in question it would seem that the stevedores were not within the intendment of the exemption. It is

[15] *Gilbert, Stokes & Kerr Pty., Ltd.* v. *Dalgety & Co., Ltd.* (1948) 48 S.R. (N.S.W.) 435; *Waters Trading Co., Ltd.* v. *Dalgety & Co., Ltd.* (1951) 52 S.R.(N.S.W.) 4.

[16] An extensive literature has developed on the determination of the *ratio* of a divided court. See, *e.g.*, Paton and Sawer, 63 L.Q.R. 462; Coutts, 64 L.Q.R. 463; Lord Asquith, 1950 J.S.P.T.L. 358; Montrose, 2 West.Aust.L.R. 301; Honoré, 71 L.Q.R. 196; Montrose, 20 M.L.R. 124.

[17] [1924] A.C. 522.

[18] MacDougall, *op. cit.*, argues that this is the correct analysis of the *Elder Dempster* case and that the result is sociologically desirable because a master should not be able to exclude his own liability while leaving his servants or agents unprotected—they being usually less able to bear the loss and less likely to be insured.

[19] 95 C.L.R. at p. 60.

[20] 359 U.S. 297; [1959] 1 Lloyd's Rep. 305.

true that the clause provided that the goods " are in such custody at the sole risk of the owners " but it went on immediately to provide " and the carrier shall not be liable for loss or damage arising or resulting from any cause whatsoever " and a reasonable construction of this would seem to be that the goods were at the owners risk *vis-à-vis* the carriers in whosoever's hands the goods were, rather than that they were at the owner's risk *vis-à-vis* the whole world. If this were so, it would have been enough for the majority to adopt this construction and to reject vicarious immunity. However, although they were agreed on the rejection of vicarious immunity, they were not agreed as to whether it was necessary to rely on the fact that the stevedores were not within the benefit of the exemption clause.

Fullagar J., with whom Dixon C.J. concurred, thought that even if the stevedores could show that they were within the benefit of the exemption clause, privity of contract would prevent them relying on it. He rejected Denning L.J.'s suggestion in *Adler* v. *Dickson* [21] that a third party could rely on an exemption clause made for his benefit, as being contrary to *Tweddle* v. *Atkinson* [22] and *Dunlop* v. *Selfridge*.[23] Further, he thought it was desirable to deny the third party this protection as this would be in conformity with the tendency to cut down the scope of exemption clauses. Fullagar J.'s attitude to the problem substantially coincides with that of Diplock J. and his judgment fully supports Diplock J.'s widest conclusion. He thought that nothing turned on the construction of the particular bill of lading, although he inclined to the view that the bill of lading on its true construction only purported to protect the shipowner.[24]

Kitto J. analysed the problem in a different manner. He agreed that the *Elder Dempster* case [25] did not set up the wide doctrine of vicarious immunity for which the defendants contended, but he did not agree with Fullagar J. and Dixon C.J. that the problem could be resolved by invoking the doctrine of privity of contract. Instead he took the view here contended for, *viz.*, that the contract was not relevant as a contract but as evidence of consent and that accordingly the doctrine of privity of contract was irrelevant. He observed [26]:

> " I do not think, however, that the main difficulty in this class of case arises in regard to the rule that the benefit and the burden of contracts are, generally speaking, confined to the contracting parties. . . . It is with an action of tort that we are here concerned; and a provision found in a document to which A and B are the only parties may well, either alone or

[21] [1955] 1 Q.B. 158; [1954] 3 All E.R. 397.
[22] (1861) 1 B. & S. 393.
[23] [1915] A.C. 847.
[24] 95 C.L.R. at p. 79.
[25] [1924] A.C. 522.
[26] 95 C.L.R. at p. 81.

with other circumstances, provide a stranger, C, with a defence to such an action. . . . A defence of *volenti non fit injuria* may be perfectly good, it seems to me, notwithstanding that the plaintiff's consent to accept the risk of injury for which he sues is expressed in a contract to which the defendant was not a party. Such a defence amounts to a denial that the defendant was under the duty of care which he is charged with having omitted to observe, the duty being negatived by the plaintiff's consent . . . it is not necessary to the defence that the consent should have been given by a contract between the plaintiff and defendant."

He thought that accordingly the important question was whether the plaintiff had consented to take the risk *vis-à-vis* the defendant. It was this difficult question of construction with which he thought the House of Lords grappled in the *Elder Dempster* case.[27] In the present case he was unable to find sufficient evidence of such consent by the plaintiffs and accordingly their action succeeded. It is submitted accordingly that the case cannot be regarded as clear authority for the view favoured by Diplock J. that even where the exemption clause is for the benefit of a stranger he cannot avail himself of it; but that it only decides that where the exemption clause is not expressly or by necessary implication for the benefit of the defendant, he cannot avail himself of it, because the doctrine of vicarious immunity is not good law.

It would seem that the following conclusions may be drawn.

1. An exemption clause contained in a contract between A and B will not avail C merely because C is a servant, agent or independent contractor engaged in the performance of the contract.

2. The effect of an exemption clause in a contract between A and B which expressly or by clear implication purports to exclude the liability of C has not been finally decided. It is submitted that it is irrelevant that C is not a party to the contract because he is not seeking to enforce the contract but merely to rely on it as evidence of consent. Whether the contract does evidence consent is a question of construction to be determined in the light of all the circumstances. This view is consistent with the decisions, though not the dicta, in all the cases except *Cosgrave* v. *Horsfall* [28] where the question was not approached in this way.

Conclusions

It is submitted, therefore, that the judgments of the Court of Appeal in *Green* v. *Russell* and of Diplock J. in *Midland Silicones Ltd.* v. *Scruttons Ltd.*, though they indicate a regression from the extreme position taken up by Denning L.J., do not finally decide

[27] [1924] A.C. 522. *Cf.* MacDougall, *op. cit.* at p. 247, note 29.
[28] (1945) 62 T.L.R. 140.

that a third party can never sue upon a contract made for his benefit because:

1. On either of the interpretations of the Fatal Accidents (Damages) Act, 1908, s. 1, adopted in *Green* v. *Russell*, it was unnecessary to decide whether the plaintiff's son had any enforceable right under the insurance policy.

2. The view expressed that he had no such enforceable right was correct, for (a) it was not open, on the authorities, for the Court of Appeal, as opposed to the House of Lords, to find a trust on such facts and (b) section 56 of the Law of Property Act was not relied on. There is authority for not applying section 56 to such a case but none of this was binding on the Court of Appeal. It is conceived that a narrow interpretation of the section cannot be supported by relying on the distinction between privity of contract and the rule that consideration must move from the promisee since in the case of simple contracts these rules are identical.

3. The contract in *Midland Silicones Ltd.* v. *Scruttons Ltd.* was not, on its true construction, for the benefit of the defendant. Even if the contract had been for the defendant's benefit, privity of contract would have been irrelevant to the issue.[29]

M. P. Furmston.*

[29] While this article was in the press the Court of Appeal affirmed the judgment of Diplock J. The judgment of the Court of Appeal is not available at the time of writing, except in *The Times* of Friday, June 3, 1960.

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HIRE-PURCHASE AGREEMENTS AS BILLS OF SALE (I)

The question has often come before the courts whether a document which purports to be a hire-purchase agreement is to be treated as a bill of sale. In the second part of this article, which will appear later, it is proposed to review the cases in an attempt to discover what principles guide the courts in deciding this problem. First, however, it is necessary to consider shortly the objects of the Bills of Sale Acts, the statutory definition of a bill of sale, and the effect of the Acts.

Part I: The Bills of Sale Acts

At common law a bill of sale is simply "a written instrument effecting a transfer of personal property"[1] or, more shortly, a "conveyance" of goods. The most common examples were no doubt a deed of gift of goods, an assignment of personal property for the benefit of creditors, and a mortgage on goods, but even a simple contract in writing for the sale of goods was properly described as a bill of sale.

No special form or formalities were required, though usually a deed was executed, and a deed was later essential to effect a gift of goods where possession of the goods did not pass to the grantee.[2] This kind of transaction early caught attention, for an attempt to transfer the ownership of goods from A to B, where A remained in possession of the goods after he had ceased to be their owner, was clearly capable of misleading persons dealing with A; they would naturally assume that he remained the owner of the goods which were still in his possession, whereas had they known the true position they might have been less prepared to allow A credit.

In 1376 collusive gifts were avoided in favour of execution creditors,[3] and three years later it was enacted in more general terms that "fraudulent deeds made by debtors to avoid their creditors, shall be void."[4] To the like effect was the statute 3 Hen. 7, c. 4,[5] and in 1571 came the well-known Act, 13 Eliz. 1, c. 5, passed, according to its preamble,[6] because the earlier legislation had been of little

[1] *Oxford English Dictionary*. The expression is still used in this sense in relation to the transfer of a British ship or a share therein: see Merchant Shipping Act, 1894, s. 24, and the form of bill of sale in the First Schedule to that Act.

[2] *Cochrane* v. *Moore* (1890) 25 Q.B.D. 57; Y.B. 7 Edw. IV, Mich., pl. 21 and 29 (1467). See, too, Pollock (1890) 4 L.Q.R. 446 (reprinted in *Essays in the Law* at p. 141).

[3] 50 Edw. 3, c. 6.

[4] 2 Ric. 2, Stat. 2, c. 3 (1379).

[5] 1486.

[6] See note on next page.

avail. This Act avoided every conveyance of property, real or personal, with "intent to delay, hinder or defraud creditors."[7]

Originally, the courts were prepared to presume fraud in any transfer of property where the grantor remained in possession,[8] but this view was mellowed in course of time. The present position is that the presence of fraud is a question of fact; retention of possession by the grantor is merely one of the relevant circumstances and may well be explained by the nature of the transaction, particularly, for example, where the transfer is in effect a mortgage on goods.[9]

In an attempt to avoid litigation after the event, and on the principle that prevention is better than cure, the Bills of Sale Act, 1854,[9a] sought to avoid disputes by giving public notice of transfers of goods where no possession passed. This was done by requiring registration of such documents in a register open to public inspection. This Act applied to all bills of sale, whether absolute or conditional, where the grantor retained possession but gave the grantee the right to take possession in certain circumstances. The "absolute bill of sale" was an out-and-out transfer of ownership to the grantee, of which the transfer in fraud of creditors was the extreme example, while the "conditional bill of sale" or "security bill of sale" was in reality a mortgage on goods: the grantor transferred the ownership in the goods to the grantee in consideration of a loan of money; if the grantor defaulted in repayment, the grantee had the right to seize the goods, but if the grantor duly repaid the loan (with interest, if any) the property revested in the grantor.

The Bills of Sale Act, 1878, substantially re-enacted the 1854 Act, which it repealed. But one change in the law in 1878 led to a sudden rise in the popularity of bills of sale with moneylenders, for section 20 of the 1878 Act, for the first time, enabled the grantee of a duly registered bill of sale to claim possession even of trade goods as against the trustee in bankruptcy of the grantor.[10] The

[6] "For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore: which feoffments, gifts . . . [etc.] have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors . . ., not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing . . . between man and man, without which no commonwealth or civil society can be maintained or continued."

[7] Now enacted by s. 172 of the Law of Property Act, 1925.

[8] *Twyne's Case* (1601) 3 Co.Rep. 80b (Star Chamber), at p. 81a; *Edwards* v. *Harben* (1788) 2 T.R. 587.

[9] See *Cookson* v. *Swire* (1884) 9 App.Cas. 653 (H.L.), *per* Lord Blackburn at pp. 664–665. The development of the law is traced in Smith's *Leading Cases* (13th ed., 1929), Vol. 1, pp. 12–15.

[9a] Passed in the same session as the Usury Laws Repeal Act, 1854.

[10] The Bills of Sale Act, 1878, s. 20, provides that goods comprised in a duly registered bill of sale "shall not be deemed to be in the possession, order, or

increase in the number of bills of sale led the legislature to protect borrowers, and the security bill of sale is now largely regulated by the Bills of Sale Act (1878) Amendment Act, 1882.[11]

Definition of Bill of Sale

The statutory definition of "bill of sale" is to be found in section 4 of the Bills of Sale Act, 1878. The expression has the same meaning in the 1882 Act, save that the later Act is limited to bills given by way of security for the payment of money.[12] But both Acts apply only to bills of sale "whereby the holder or grantee has power . . . to seize or take possession of any personal chattels . . ." [13]

There are therefore always three questions to be asked:

(i) is the document within section 4 of the 1878 Act? If not, neither Act applies to it. If it is—

(ii) is it a bill whereby the grantee has power to take possession of goods? If not, neither Act applies. If it is—

(iii) is it given by way of security for the payment of money? If not, it is governed by the 1878 Act alone. If it is, it is governed by the 1882 Act.

The definition in section 4 of the 1878 Act is long and verbose, and until the advent of the Rent Acts the Bills of Sale Acts held unchallenged sway as the most criticised examples of parliamentary draftsmanship.[14] Any attempt, therefore, to summarise the definition, as explained by the cases, is necessarily dangerous and potentially misleading, but it is, perhaps, worth making. The essence of the definition, selecting some of the statutory words, is:

"'bill of sale' shall include
bills of sale,
assignments,
transfers,
declarations of trust without transfer . . .
and other assurances of personal chattels,
and also . . .

disposition of the grantor of the bill of sale" within the meaning of what is now the Bankruptcy Act, 1914, s. 38 (*c*). They are thus excluded from the "reputed ownership" clause which relates to goods in the bankrupt's trade or business.

[11] See E. Cooper Willis, "The Bills of Sale Acts" (1887) 3 L.Q.R. 300 at p. 300; E. G. Coppel, "The True Nature of the Transaction" (1933) 6 A.L.J. 430, 431. The whole story is well told in Chap. 5 of Professor C. H. M. Waldock's *The Law of Mortgages* (1950). The further amending Acts of 1890 and 1891 are not material to this article.

[12] Bills of Sale Act (1878) Amendment Act, 1882, s. 3. The 1882 Act does not apply in any respect to absolute bills of sale: *Swift* v. *Pannel* (1883) 24 Ch.D. 210, Fry J. See D. B. Murray, "When is a Repeal Not a Repeal?" (1953) 16 M.L.R. 50 at pp. 56–58.

[13] Bills of Sale Act, 1878, s. 3.

[14] See, for example, Lord Macnaghten's characteristic condemnation of the 1882 Act, and call (as yet unanswered) for amending legislation: *Thomas* v. *Kelly* (1888) 13 App.Cas. 506 (H.L.) at p. 517.

> licenses to take possession of personal chattels as security for any debt,
>
> and also
>
> any agreement . . . by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred . . ."

The effect of the definition is that a bill of sale is a document, granted by the owner of goods,[15] giving some other person[16] a legal or equitable right to the goods, and entitling the grantee to take possession of those goods. Three important points merit emphasis:

1. *There must be a document*

Whatever the legal effect of the transaction, it is only caught by the Bills of Sale Acts if there is some document evidencing or representing what has been agreed. "The Acts are aimed at documents, not at transactions."[17] This means that a verbal agreement, even though evincing all the features which the Bills of Sale Acts seek to regulate, will be perfectly valid and enforceable provided the court can be satisfied, by the evidence presented, as to the effect and detailed terms of the transaction. As Bramwell L.J. put it:

> "The legislature has not thought it right to lay down in direct terms as a general rule, that where the property in goods is parted with and the former owner nevertheless remains in possession, the transaction shall be manifested by some document . . ."[18]

The chief reasons why more use is not made of the "verbal bill of sale" are these. A professional moneylender[19] must obtain a note or memorandum in writing, containing all the terms of the contract, signed by the borrower,[20] and this note or memorandum would itself constitute a bill of sale, as we shall see in a moment. For non-professional moneylenders, and for absolute bills of sale, verbal bills are theoretically possible, but, however many witnesses there are, and however reliable they may be, there is always a potential risk of failing to satisfy the court of all the material terms

[15] The "grantor."
[16] The "grantee."
[17] *Waight* v. *Waight and Walker* [1952] 2 All E.R. 290, *per* Collingwood J. at p. 292. (The report in [1952] P. 282 is confined to the procedural point in dispute.)
[18] *Marsden* v. *Meadows* (1881) 7 Q.B.D. 80, at p. 86. See, too, Bowen L.J., *North Central Wagon Co.* v. *Manchester, etc., Ry.* (1887) 35 Ch.D. 191, at p. 207, where he points out that "that is a result which it may be said enables people to drive a coach and four through the Act of Parliament." As to the possibility of a verbal mortgage of goods, see Crossley Vaines, *Personal Property*, 2nd ed., p. 321, and the cases there cited in notes (*h*) and (*i*).
[19] *i.e.*, a moneylender as defined by s. 6 of the Moneylenders Act, 1900.
[20] Moneylenders Act, 1927, s. 6.

of the transaction, and that they have been agreed by the grantor.[21] Furthermore, however confident one may be of the witnesses and of the law, there is a natural reluctance to embark on a financial transaction of any importance without a written document to support it.

In some cases a verbal agreement has been followed by a subsequent written document, such as a receipt or a memorandum of the agreement. The position here is made more complicated by the provisions of section 4 of the 1878 Act, which states that "'bill of sale' shall include . . . inventories of goods with receipt thereto attached, or receipts for purchase money of goods,[22] and other assurances of personal chattels . . . " The cases, however, show that a receipt is only to be treated as a bill of sale if it is a document "on which the title of the transferee depends."[23] The real question here is, indeed, one of evidence: is the oral agreement admissible in evidence, in which case the writing may be ignored and the grantee may rely on his verbal rights? Or has the agreement been reduced into writing, so that the court may look only at the document?

A good illustration of the application of these principles is afforded by *Newlove* v. *Shrewsbury*[24]:

> Smith & Hancock, a firm, were in financial difficulties. S, the defendant, guaranteed repayment of the firm's bank overdraft, and in consideration of this the firm orally made over to S their property in a lace machine. It was agreed that if the firm discharged their bank overdraft within four months, the machine was to revert to them; but if not, S was to be entitled after four months to sell the machine and discharge his guarantee with the proceeds. The lace machine was at the time in the possession of A under a conditional sale agreement, and the agreement was indorsed as follows: "Received of Mr. William Shrewsbury the sum of £580, for and in satisfaction of all our interest and property in the lace machine within described and the within written agreement. Smith & Hancock." More than four months later, A defaulted under the sale agreement, and S took possession of the machine and sold it, keeping the proceeds. Eventually he was called upon to pay the bank on his guarantee. The plaintiffs, who were trustees for the firm's creditors, claimed the return of the machine or its value from S, on the ground that the receipt indorsed on the sale agreement was a bill of sale, and was void for non-registration.

21 Why not a tape recording? *Cf.* Professor G. S. A. Wheatcroft, "Feather-bedding Death" [1958] B.T.R. 375.

22 These words were omitted from the summary given above.

23 *Marsden* v. *Meadows* (1881) 7 Q.B.D. 80 (C.A.), *per* Cotton L.J. at pp. 84–85. See. too, Lord Macnaghten, *Manchester, etc., Ry.* v. *North Central Wagon Co.* (1888) 13 App.Cas. 554 (H.L.), at p. 569, and the members of the Court of Appeal in that case, *sub nom. North Central Wagon Co.* v. *Manchester, etc., Ry.* (1887) 35 Ch.D. 191.

24 (1888) 21 Q.B.D. 41 (C.A.).

The Court of Appeal held that the receipt was not a bill of sale, and dismissed the plaintiffs' claim. If the agreement between the firm and S had been set down in writing, that document would clearly have been a security bill of sale, and would have required registration. But here the agreement was made verbally, and the receipt did not purport to be a memorandum of the agreement. Lindley L.J., after explaining that the question turned more on the general principles of the law of evidence than on the Bills of Sale Acts, said: "Where there is a document expressing the agreement between the parties, parol evidence of their agreement cannot be given; and the [right to] possession must be referred to the document and, if that is void, possession under it is of no avail. . . . But the document here is a mere receipt, and does not express, and was never intended to express, the agreement between the parties. The defendant's right to possess does not depend upon the receipt, but upon an agreement not reduced into writing at all. The receipt is not wanted to prove the defendant's title, and its non-registration does not destroy that title. A receipt to be a bill of sale must be a document of title, *i.e.*, a document necessary to the defendant's title, an assurance of some kind . . ." [25]

A few years later, Lord Esher M.R. summed up the law in the following terms: "If a document is intended by the parties to it to be a part of the bargain to pass the property in the goods, then whatever the form of the document may be, even if it be only a simple receipt for the purchase money, it is, by section 4, to be deemed to be a bill of sale, though it is not so in fact. But, if the document is not intended to be part of the bargain to pass the property in the goods—if the bargain is complete without it, so that the property passes independently of it—then it is not to be deemed to be . . . a bill of sale." [26]

2. *There must be an assurance of property*

If there is a document expressing the agreement between the parties, regard must then be had to its legal effect. The essence of the legal effect of a bill of sale is that it transfers from the grantor to the grantee property rights in the goods. It may transfer the

[25] (1888) 21 Q.B.D. 41, at p. 45. See, too, Lord Esher M.R. in *Madell* v. *Thomas & Co.* [1891] 1 Q.B. 230 (C.A.), at pp. 233, 234.

[26] *Ramsay* v. *Margrett* [1894] 2 Q.B. 18 (C A.), at pp. 23–24. Lord Esher continued: "If a purchaser of goods asks the vendor for a simple receipt for the purchase-money, is that receipt part of the bargain to pass the property in the goods? It seems to me it would be absurd to say that it is. When you have paid the price of goods which you buy in a shop and you ask for a receipt for the money is that receipt part of the bargain to pass the property in the goods? Certainly not." Contrast *Youngs* v. *Youngs* [1940] 1 K.B. 760 (C.A.), where it was found as a fact that a receipt for the purchase-money of goods was intended to act as an assurance of the goods. If the document, even though in the form of a receipt, contains essential terms of the contract, and these terms are not shown to have formed part of the prior verbal agreement, the court may feel bound to hold that the document is intended to form part of the bargain: *Re Hood* (1893) 9 T.L.R. 541 (C.A.).

legal title, or it may transfer an equitable right.[27] But the document must represent an assurance of some kind of property rights.[28]

3. *It must entitle the grantee to take possession*

Even though a document is a bill of sale in that it transfers property rights, we have already seen that the Bills of Sale Acts only apply to it if it is a document "whereby the . . . grantee has power . . . to seize or take possession of any personal chattels. . ." [29]

Thus a pledge, which rests on the delivery of possession to the pledgee, not on his *right* to take possession, has been held not to fall within the Acts, even though accompanied by a document setting out the rights of the parties.[30] So, too, a deed of gift of goods where the grantee takes immediate possession does not require registration under the Bills of Sale Acts.[31]

In short, it may be said to be an essential feature of a bill of sale to which the Acts apply that the grantor should remain in possession of the goods and the grantee have a right to possession under the terms of the bill of sale.[32]

Excepted Documents

Certain documents, although apparently falling within the definition of a bill of sale just discussed, are specifically excluded by section 4 of the 1878 Act. Thus, assignments for the benefit of creditors,[33] marriage settlements, and transfers or assignments of a ship or a share therein [34] are all excluded.[34a]

The most important exceptions are "transfers of goods in the ordinary course of business of any trade or calling, . . . bills of lading, . . . warehouse keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented." [35]

27 The equitable aspect will be discussed in Pt. II of this article.

28 *Cf.* Lindley L.J. in *Newlove* v. *Shrewsbury* (1888) 21 Ch.D. 41, at p. 45, cited above.

29 Bills of Sale Act, 1878, s. 3.

30 *Ex p. Hubbard, Re Hardwick* (1886) 17 Q.B.D. 690 (C.A.), *per* Lord Esher M.R. at p. 697, Bowen L.J. at p. 699, Fry L.J. at p. 701; *Waight* v. *Waight* [1952] 2 All E.R. 290; and see *Wrightson* v. *McArthur* [1921] 2 K.B. 807.

31 *French* v. *Gething* [1922] 1 K.B. 236 (C.A.); see, too, *Ramsay* v. *Margrett* [1894] 2 Q.B. 18 (C.A.). *Cf. Youngs* v. *Youngs* [1940] 1 K.B. 760 (C.A.), and *Hislop* v. *Hislop* [1950] W.N. 124 (C.A.). See Professor O. Kahn-Freund (1953) 16 M.L.R. 148; J. W. A. Thornely (1953) 11 Camb.L.J. 355.

32 Even a licence to take immediate possession falls within the Acts: *Ex p. Parsons, Re Townsend* (1886) 18 Q.B.D. 532 (C.A.).

33 Registrable under the Deeds of Arrangement Act, 1914.

34 Registrable under the Merchant Shipping Act, 1894.

34a By s. 189 (1) of the Law of Property Act, 1925, certain powers of distress in relation to land are also excluded from the Acts.

35 These words have been largely adopted as the definition of "documents of title" in the Factors Act, 1889, s. 1 (4).

The emphasis here is on documents used "in the ordinary course of business." As Cozens-Hardy L.J. pointed out, "The general policy . . . was not to interfere with ordinary business transactions."[36] Probably it is a question of fact whether a particular transaction is "in the ordinary course of business,"[37] though as Professor Waldock says, "The course of business is that of the grantor not the grantee of the instrument; otherwise all moneylenders' bills of sale would be excepted from the Acts under this provision which they certainly are not."[38]

What of a sale between private persons? If I sell you my piano by a written contract permitting you to take delivery in a month's time, the document would appear to be a bill of sale within the definition of the 1878 Act. Since it is not a transfer of goods in the ordinary course of business of any trade or calling it would not be excluded from the definition, and hence it would require attestation by a solicitor and registration. This would not defeat your rights against me personally, but it seems that you would lose your right to the piano if I became bankrupt or if execution was levied against me before you obtained the piano.[39] Strangely enough, the point seems never to have been taken, so there is no authority for this suggestion, but it is difficult to see how the court could avoid holding that the contract of sale is a bill of sale.[40]

The Effect of the Bills of Sale Acts

It is not proposed to discuss in detail the effect of the Bills of Sale Acts, 1878 and 1882, on bills to which they apply.[41] It is however necessary to summarise the effect of the Acts, which varies according to whether the bill is absolute or by way of security.

Absolute bills

The 1878 Act imposes requirements as to form and registration:

(a) *Form.* The 1878 Act does not prescribe a form for the bill, but provides that the bill must set forth the consideration for which

[36] *Re Hamilton Young & Co.* [1905] 2 K.B. 772 (C.A.), at p. 789.

[37] In *Stephenson* v. *Thompson* [1924] 2 K.B. 240 (C.A.) the question seemed to turn largely on the evidence.

[38] *The Law of Mortgages*, p. 92, note 59. *Cf. Tennant* v. *Howatson* (1888) 13 App.Cas. 489 (P.C.), *per* Lord Hobhouse at p. 494: "Though it is not easy to say with any precision all that is meant by the expression 'the ordinary course of business,' their Lordships are of opinion that it does not point to the borrowing of money on mortgage or special agreement, though such a thing may be frequent among certain classes of persons." In *Re Hamilton Young & Co.* [1905] 2 K.B. 772 (C.A.) letters of lien given to a bank by way of security to finance exports were held not to be bills of sale.

[39] See below as to the effect of the Acts.

[40] See *Brantom* v. *Griffits* (1877) 2 C.P.D. 212 (C.A.) *Cf. Re Roberts* (1887) 36 Ch.D. 196 (Kay J.), holding that a memorandum under s. 17 of the Statute of Frauds, 1677, was a bill of sale.

[41] The best account of security bills of sale is in Waldock, *The Law of Mortgages*, Chap. 5. On both absolute and conditional bills see Gibson's *Conveyancing* (18th ed., 1959), Part III.

the bill was given,[42] and that it must be attested[43] by a solicitor.[44] The attestation clause must state that before execution the effect of the bill was explained to the grantor by the attesting solicitor,[45] but surprisingly it has been held by the Court of Appeal that if the attestation clause is in the proper form, the bill is valid even if the solicitor did not in fact explain the bill.[46]

(b) *Registration.* The bill must be registered at the Central Office of the Supreme Court[47] within seven days.[48] The register is open to public inspection.

If any of these requirements as to form and registration is not complied with, the bill is nevertheless perfectly valid as between grantor and grantee in all respects. Even as against the outside world, any contractual obligations created by the instrument remain valid and enforceable. But as against the grantor's trustee in bankruptcy or assignee for the benefit of his creditors, or as against a sheriff or bailiff levying execution against goods or an execution creditor, the bill "shall be deemed fraudulent and void so far as regards the property in, or right to the possession of, any chattels comprised in such bill of sale. . . ."[49]

As we have seen, goods comprised in a duly registered absolute bill of sale are excluded from the "reputed ownership clause"[50] of the Bankruptcy Act, 1914.[51]

Security bills

Bills of sale by way of security for the payment of money are governed by the 1882 Act, which imposes provisions as to form, registration and legal effect.

(a) *Form.* There are five requirements as to form:

(i) The bill must be substantially[52] in accordance with the form set forth in the Schedule to the 1882 Act.[53] If it

42 Bills of Sale Act, 1878, s. 8.
43 *i.e.*, signed as a witness to the grantor's signature.
44 1878 Act, ss. 8 and 10 (1).
45 1878 Act, s. 10 (1).
46 *Re Haynes* (1880) 15 Ch.D. 42 (C.A.). James L.J. thought that the requirement was for the protection of the grantor, and that the sanction lay in the solicitor's potential liability (*ibid.* at p. 52), while Bramwell L.J. thought it was for the protection of creditors (*ibid.* at p. 56), though it is difficult to see how they would be prejudiced if the bill became void. The real justification is probably an attempt to discourage litigation about duly registered bills: see Bramwell L.J., *loc. cit.*
47 At the Filing Department, Room 81, Royal Courts of Justice, Strand, London, W.C.2.
48 1878 Act, ss. 8 and 10 (2). See R.S.C., Ord. 61, r. 25, and the notes thereto in the *Annual Practice.*
49 1878 Act, s. 8. An innocent purchaser of the goods from the grantor of the bill acquires no title, whether or not the bill is registered, unless he can rely on the Factors Act, 1889, or s. 25 (1) of the Sale of Goods Act, 1893, or some other exception to *nemo dat quod non habet.*
50 Bankruptcy Act, 1914, s. 38 (*c*).
51 1878 Act, s. 20, repealed as to security bills by 1882 Act, s. 15.
52 *Ex p. Stanford, Re Barber* (1886) 17 Q.B.D. 259 (C.A.), at p. 270.
53 1882 Act, s. 9.

is not in this form, it is void in every respect, both as between grantor and grantee and as against the outside world (including a purchaser from the grantor, who therefore acquires a good title). But the grantee who has lent money to the grantor on the security of the void bill is not completely without a remedy, for he may sue the grantor personally[54] for money had and received.[55]

(ii) The bill must contain a schedule listing the goods comprised in the bill.[56] If there is no schedule, the bill is not in the statutory form and is therefore wholly void.[57]

(iii) The schedule to the bill must specifically describe the goods comprised in the bill.[58] If this is not done, the bill remains valid and enforceable as between the grantor and grantee personally, but is void as against the outside world in respect of any goods not specifically described. Contractual obligations remain effective.

(iv) The bill must truly set forth the consideration for which it was given.[59] If not, it is void as a security on goods both as against the grantor and as against the outside world, but the contractual obligations remain effective and the grantee can claim as an unsecured creditor.[60]

(v) The bill must be attested by a credible witness.[61] Unlike the case of an absolute bill, the witness need not be a solicitor and the attestation clause does not state that the effect of the bill has been explained, for the statutory form must be followed, and this form was thought by the legislature to be fair to the grantor and, apparently, so simple as not to require explanation. If the bill is not attested by a credible witness the bill is not in the statutory form and is wholly void.[62]

[54] Or prove in his bankruptcy as an unsecured creditor.

[55] *Davies* v. *Rees* (1886) 17 Q.B.D. 408 (C.A.), *per* Lord Esher M.R. at p. 411: "It was not intended by the Act that the borrower should be able to keep the money which he had borrowed . . . because the bill of sale was made void." In *Bradford Advance Co., Ltd.* v. *Ayers* [1924] W.N. 152 (D.C.), at p. 153, Bailhache J. explained the principle. It was held that the grantor must repay the loan with interest at a reasonable rate (put at 5 per cent.), not following *Wilkins* v. *New Saville Securities, Ltd.* (1922) 39 T.L.R. 85, where Darling J. gave judgment for the money lent with the agreed rate of interest, resting the obligation on an independent verbal agreement. It seems that the quasi-contractual claim is the true cause of action, though the right to repayment of the principal sum itself does not appear to have been contested in any of the cases.

[56] 1882 Act, s. 4. Ss. 4 and 5 are the reason why an individual cannot grant a floating charge on goods.

[57] *Griffin* v. *Union Deposit Bank* (1887) 3 T.L.R. 608.

[58] 1882 Act, s. 4.

[59] 1882 Act, s. 8.

[60] But if no statement of the consideration is made at all, the bill is not in the statutory form and is wholly void: *Heseltine* v. *Simmonds* [1892] 2 Q.B. 547.

[61] 1882 Act, ss. 8 and 10.

[62] *Parsons* v. *Brand* (1890) 25 Q.B.D. 110.

(b) *Registration.* The bill must be registered at the Central Office of the Supreme Court within seven days.[63] If this is not done, the bill is void as a security on goods (even as against the grantor), but the contractual obligations remain effective and the grantee is an unsecured creditor for the money lent with the interest as agreed.

(c) *Legal effect.* No security bill can be given in consideration of any sum under £30[64]: if it is, the bill is completely void and the grantee is merely an unsecured creditor.[64a] The grantor must be the true owner of the goods specifically described in the schedule at the time of execution of the bill[65]: if he is not, the bill is void as against the outside world in respect of any goods of which the grantor is not owner, but the bill remains valid in respect of the other goods, and even in respect of goods not the property of the grantor the bill is valid as against the grantor personally. Finally, the Act of 1882 provides that the grantee may only take possession of the goods for the causes listed in the Act.[66]

The 1882 Act does not apply to debentures issued by an incorporated company,[67] and goods comprised in a security bill of sale are not excluded from the "reputed ownership clause."[68]

(To be concluded.)

AUBREY L. DIAMOND *

[63] 1882 Act, s. 8. If the grantor resides, or the goods are, outside the London bankruptcy district, the Registrar (*i.e.*, the Masters of the Queen's Bench Division) transmits details to the local county court: 1882 Act, s. 11. There is no provision for local registration of absolute bills, but such a provision appears to be assumed by the Administration of Justice Act, 1925, s. 23, and local registration is carried out in practice, no doubt because the effect of *Swift* v. *Pannel* (1883) 24 Ch.D. 210 has been overlooked: see note 12, above. The practice of local registration of all bills of sale is clearly a convenient one.

[64] 1882 Act, s.12.

[64a] See note 55 above.

[65] 1882 Act, s. 5.

[66] 1882 Act, s. 7. There are five causes listed.

[67] 1882 Act, s. 17. By s. 95 of the Companies Act, 1948, companies registered under the Companies Acts must register at the Companies Registration Office, *inter alia*, "a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale." Although no form is prescribed, the security is void as against the liquidator and any creditor of the company unless registered within twenty-one days.

[68] 1882 Act, s. 15, which repeals s. 20 of the 1878 Act as to security bills.

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STATUTES

The Mental Health Act, 1959

I. *The Act and the Criminal Law*

1. *General description*

This is an extremely long Act, containing 154 sections and eight schedules. It seeks to implement, with minor variations, the recommendations of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency, 1954–57.[1] In introducing the Bill at the Second Reading in the House of Commons, the Minister of Health described the existing laws relating to mental health as "complex, difficult, and in many respects out of date." *The Times* had described them as a jungle. The Act seeks to replace the mosaic of outdated and complicated law and procedure with a streamlined and simplified system of law and procedure in keeping with modern ideas on the subject.[2]

The aim of the Act is to emancipate the treatment of mental disorder, both in the mental hospitals and in the community, from the shackles of certification and compulsion so far as is consistent with the protection of the public and the preservation of the liberty of the subject. Two main principles inspire its provisions. One is to provide as much treatment as possible, both in hospital and outside, on a purely voluntary basis; the other is to make proper provision for the inevitable residuary category of cases where compulsion is necessary in the interests of society or of the patients themselves. The first principle is implemented by removing the procedural formalities which at present attend the voluntary treatment of patients, and the separate designation of mental hospitals and mental deficiency hospitals, so that henceforth any general hospital may receive patients suffering from any form of mental disorder. The Board of Control, which previously presided over the work of the mental hospitals, is to be dissolved,[3] and its functions transferred to the Ministry of Health, to local authorities,[4] and to the new mental health review tribunals which are to be set up in each region.[5] Instead of the system of designated hospitals and segregated treatment, henceforth mental health will be dealt

[1] Cmnd. 169, May 1957. See review by Professor Norval Morris (1958) 21 M.L.R. 63.

[2] Mr. Derek Walker-Smith, H.C. Parl. Deb. (5th ser.), Vol. 598, col. 704 *et seq.*, January 26, 1959.

[3] s. 2.

[4] Part II of the Act deals with local authority services. Part III regulates mental nursing homes, residential homes, etc.

[5] s. 3.

with, so far as possible, as an integral part of the work of the National Health Service.

The second principle referred to above is implemented by the careful definition of the various legal categories of mental disorder,[6] the detailed limitation of the powers of the courts and mental hospitals to detain persons suffering from mental disorder against their will,[7] and the provision of elaborate checks and balances through the appeal to the mental health review tribunal, appeals on points of law from them to the High Court,[8] and compulsory admission for observation or treatment only on the authority of two medical practitioners, at least one of whom must be specially experienced in the diagnosis or treatment of mental disorders.[9] This latter safeguard applies equally to the making of an application for a guardianship order.[10]

2. *Importance to the criminal lawyer*

It is impossible in the space of a short review to discuss all the ramifications and implications of this important new deal for the mentally disordered. The details of the new dispensation on the civil side will not be discussed; we shall consider only those aspects which are particularly of concern to the criminal law or of interest to the criminal lawyer, as affecting the disposal of offenders or potential offenders, and the principles of responsibility. At the same time it must be pointed out that the Act raises important questions of general principle and policy, such as the question whether it should be left to the local authorities to provide the necessary services on a permissive or on a mandatory basis, and the question whether it is appropriate to leave the exercise of the compulsory powers entirely in the hands of the medical men in the first instance, subject only to the patient's or nearest relative's right of appeal to the mental health review tribunal. Strong arguments have been advanced to the effect that the solution adopted in the Act to both these questions is mistaken.[11]

Three aspects of the new law concern the criminal lawyer:

(i) *The admission of patients concerned in criminal proceedings, and the transfer of patients under sentence.* This is dealt with by Part V of the Act, which contains provisions empowering courts of assize or quarter sessions [12] and magistrates' courts [13] to deal with

[6] s. 4.
[7] Part IV deals with compulsory admission to hospital and guardianship.
[8] s. 124 (5).
[9] ss. 25 and 26, and, as to medical recommendations, s. 28. Emergency applications are provided for by s. 29.
[10] s. 33.
[11] See the Second Reading debate, referred to above, note 2.
[12] s. 60 (1).
[13] *Ibid.* By virtue of s. 60 (2) the magistrates' court may *in the case of a person suffering from mental illness or severe subnormality* make such an order without proceeding to a conviction. This corresponds with the power under the present law.

persons accused of criminal offences as suffering from mental disorder and make orders for hospital admission or guardianship. These provisions correspond broadly with the powers existing under the present law, but there are some new features. The evidence of two doctors, one of whom is specially experienced, etc., is required, as on the civil side,[14] and the court shall not make an order for compulsory admission to hospital unless arrangements have been made for the admission of the offender into hospital within twenty-eight days.[15] An order for guardianship shall not be made unless the authority or person is willing to receive the offender into guardianship.[16] And there are special provisions dealing with the powers of juvenile courts.[17]

The effect of such a compulsory order is to limit the rights of the patient or nearest relative with regard to discharge, subject to an appeal to the mental health review tribunal within certain time limits.[18] The possibility that mental hospitals might discharge persons who are a danger to the public has been met by section 65, which gives the higher courts additional power to make a hospital order subject to special restrictions concerning the person's discharge, either without limit of time, or for a specified period.[19] In the event of such an order subject to restrictions being made, it has the effect of transferring to the Home Secretary the discretion concerning discharge, leave of absence, transfer and recall.[20] If a magistrates' court, on convicting a person over 14 of an offence punishable on summary conviction with imprisonment, considers that a restriction order might be made relating to the person, it may commit him to a higher court for that purpose.[21] By resort to these provisions fears of premature release of offenders may thus be allayed. There is a right of appeal to the Court of Criminal Appeal from any decision of a higher court making a restriction order,[22] and provision is made for appeals from any decision by a magistrates' court making an order for guardianship or a hospital order.[23]

Part V also deals with Her Majesty's pleasure cases, which are to await the Secretary of State's direction concerning the place of detention, as at present.[24] Such a direction when made shall have effect as a hospital order together with an order restricting discharge made without limit of time.[25] This part of the Act also deals with

[14] *Cf.* ss. 25 and 26, and s. 33. In case of an emergency application, only one medical recommendation is required, s. 29.
[15] s. 60 (3).
[16] s. 60 (4).
[17] s. 61.
[18] s. 63 (3) and (4).
[19] s. 65 (1).
[20] ss. 65 (3) and 66.
[21] s. 67.
[22] s. 69.
[23] s. 70.
[24] s. 71 (1) and (2).
[25] s. 71 (4).

the transfer to hospital or guardianship of persons already serving a sentence of imprisonment,[26] or who are in custody pending trial or awaiting sentence.[27]

(ii) *The detention of persons in "special hospitals."* The Act introduces a new phrase to describe the state institutions of Broadmoor, Rampton and Moss Side: henceforth these are to be known as special hospitals,[28] and they are placed under the Ministry of Health. Power is given to the Minister of Health to provide "such institutions as appear to him to be necessary for persons subject to detention under this Act" who "require treatment under conditions of special security on account of their dangerous, violent or criminal propensities."[29] It will be interesting to see what further institutions may be provided for such persons.

(iii) *The definition of mental disorder by section 4 of the Act.* There remains the possibility that many potentially criminal persons will be recognised as mentally disordered under the new dispensation before they have committed any criminal offence and been made the subject of a criminal prosecution. Such persons may submit to treatment voluntarily or be made the subject of a compulsory order, and the question whether they are mentally disordered will have to be decided by reference to the definition contained in section 4 of the Act. This definition will also be crucial to any disposition under the aforementioned provisions of the Act of persons charged with criminal offences.

The definition falls into two parts. First, there is a general definition of mental disorder of an inclusive nature: section 4 (1) reads: "In this Act 'mental disorder' means mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind . . ." Secondly, there follows a particular definition of three of the main kinds of mental disorder. Mental illness is not regarded as requiring express definition. Two kinds of "arrested or incomplete development of mind" are recognised, *viz.*, "severe subnormality" and "subnormality," and these are separately defined.[30] There follows a brave attempt to define the new category of mental disorder whose recognition the Royal Commission recommended, "psychopathic disorder." This is defined to mean "a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the patient, and requires or is susceptible to medical treatment."[31]

[26] s. 72.
[27] s. 73.
[28] s. 97 (3).
[29] s. 97 (1).
[30] s. 4 (2) and (3).
[31] s. 4 (4).

The specific spelling out of a definition of this new category of mental disorder, psychopathic personality, was not recommended by the Royal Commission. In their opinion, this would do much more harm than good, and it would be better to leave it to the medical men to diagnose the condition "without trying to describe medical conditions in detail in semi-medical language."[32] The main significance of any description or definition of mental disorder lies in the fact that it is this description or definition which lies at the root of the exercise of any compulsory powers, whether by civil process or by order of the criminal courts. The Government have taken the view that while the general part of the definition of mental disorder should be drafted in wide and comprehensive terms, to enable hospitals to give treatment and local authorities to accept guardianship and to authorise such provision on a broad front, the particular kinds of mental disorder should be defined narrowly, and with as much precision as possible, for they must be capable of interpretation and application by all concerned with the compulsory procedures, and, in particular, by the doctors, the new tribunals and the courts.[33]

The endeavour to find a form of words suitable to cover psychopathic disorder is a valiant one, but the result can hardly be described as satisfactory. It is all too easy for the unsympathetic scholar, or the outraged citizen and his legal representative, to cast bricks at this fragile construction with devastating effect. Let us cast the obvious ones, by way of illustration. We are told that "psychopathic disorder" means a *persistent* disorder or disability of mind. What is meant by *persistent*? Something which has persisted for a period of time, we suppose, and is evidenced by a course of conduct, and not something which has recently and suddenly arisen. Very well. This condition, we are told, must result in *abnormally aggressive or seriously irresponsible conduct*. At what point is conduct to be regarded as *abnormally aggressive*? What is normal aggression? How does one decide that conduct is *seriously irresponsible*? We know from subsection (5) that promiscuous or other immoral conduct shall not by itself be regarded as a ground for dealing with a person as mentally disordered. But what is the criterion of serious irresponsibility? This definition can be condemned in the words of the Royal Commission when they said: "we consider that any attempt to define in general terms the sort of behaviour which may justify the use of special compulsory powers is bound to fail, because it seems impossible to find general terms which are not open to a wider interpretation than is intended."[34]

Further objection can be made to the phrase "and requires or is susceptible to medical treatment" which concludes the definition.

[32] Cmnd. 169, para. 357, p. 127.
[33] The Minister of Health, in the Second Reading debate, *loc. cit.*, note 2, *supra*.
[34] *Loc. cit.*, para. 338, p. 119.

It seems to suggest that there are some disorders which require treatment but are not susceptible to it, and others which are treatable. While one can appreciate the desire to provide for the untreatable psychopath as well as those who are susceptible to treatment, one could argue that if such a person is not susceptible to treatment he can hardly *require* it. The phrase appears to be an amended version of that which is used elsewhere, for example, in section 4 (1) of the Criminal Justice Act, 1948.[35] But altering the word *and* to *or* seems to this reviewer to make nonsense out of the phrase.

Such objections may well be pedantic, however, when measured against the real purport and intent of the Act. However easy it may be to raise verbal quibbles, the fact remains that it is now recognised that a person *may* be mentally disordered who is not mentally ill or subnormal, and the way in which such a person is to be recognised is by the degree to which his conduct evidences his mental abnormality. As in the case of diminished responsibility, under section 2 of the Homicide Act, 1957, it is now accepted that there is a borderland between sanity and insanity where the one shades off into the other, which is inhabited by some seriously disturbed personalities. It is a question of degree in every case,[36] which is why the adverbs *abnormally* aggressive and *seriously* irresponsible have to be used (*cf. substantially* impaired, in connection with diminished responsibility). Lawyers, and others, should not exercise their ingenuity to raise objections, provided they are satisfied that the general direction of the changes is right. *Pace* Lady Wootton, I cannot see the danger of the slippery slope upon which it is alleged we are now embarked, which is to lead to the abandonment of the concept of criminal responsibility.[37] If there is a slope, it may well be an improvement on the too rigid vertical dichotomy between sanity and insanity with which we previously had to contend in deciding whether a person was responsible.

A more valid objection to the new deal is to the way in which vast compulsory powers have been entrusted to the medical men, subject only to review by the mental health review tribunals. There is considerable force in the argument that these tribunals might well have been brought into the picture at an earlier stage where compulsory powers are sought to be used. As it is now, there are

[35] s. 4 (1), Criminal Justice Act, 1948, says that "where the court is satisfied . . . that the mental condition of an offender is such as requires and as may be susceptible to treatment" the court may make a probation order with a condition that the offender shall submit to treatment.

[36] This has now been judicially recognised in *R.* v. *Walden* [1959] 1 W.L.R. 1008; [1959] 3 All E.R. 203; 43 Cr.App.R. 201 with regard to the question of diminished responsibility. See 23 M.L.R. 191 at 193.

[37] Barbara Wootton, *Social Science and Social Pathology*, 1959, Chap. VIII, "Mental Disorder and the Problem of Moral and Criminal Responsibility," p. 227 *et seq.*, especially at pp. 249 and 251. And see her article "Diminished Responsibility: A Layman's View" (1960) 76 L.Q.R. 224. A full consideration of Lady Wootton's views on criminal responsibility must await another occasion.

likely to be a large number of appeals, and points of law and policy of great practical importance will arise from the attempt to apply these possibly over-elaborate definitions. Some of these will no doubt be referred to the High Court, where it will be interesting to see the results.

J. E. Hall Williams.

II. *A Psychiatrist's View*

In providing for the treatment of mental disorder with as few distinctions as possible from other forms of illness, the Act confirms a trend which has been going on for some time. With advances in psychiatric treatment, and the change in the attitude of public opinion towards mental illness, it has become possible to treat an ever-increasing proportion of patients without the use of compulsion. Moreover, a larger proportion can be treated as out-patients and, within the institutions, locked doors and close restraints have been gradually reduced or abandoned, whatever the patients' legal status. In the international field the Expert Committee of the World Health Organisation recently reported that "most existing legislation is misdirected in its aim. It is concerned too much with placing checks on the mental patient and his physician, and too little with the public's responsibility for providing services for the mentally ill."[1] The Act places us in the forefront of countries with good legislation.

In the new conditions, the patient who shows a persistent behaviour disorder is not only increasingly conspicuous and troublesome, but tends to approximate more closely to the asocial and antisocial person in the wider community. The recognition of a new group of psychopathic disorders arises in part from this experience as well as a wider knowledge of disorders in the community; in this respect the Act is a courageous blueprint for future developments. In this new field, however, the attitude of the public is as full of fear and ambivalence as it was towards mental illness thirty years ago. A large section of the public would be willing to see sex deviants and others segregated semi-permanently, out of sight and out of mind; a small and sometimes embarrassing minority calls for the medical "treatment" of almost all antisocial behaviour. The new mental health review tribunals will have an important function in protecting the doctor from these varied pressures.

Less conspicuously, the Act bears witness to the coming of age of psychiatry as a medical speciality. From the medical superintendent who was the solely-responsible custodian of a number of inmates, subject to the decision of a lay magistrate, we have evolved

[1] W.H.O. Technical Report, Series No. 98, 1955, "Legislation affecting Psychiatric Treatment."

a staff of consultant psychiatrists with a modified (and still rather uncertain) arrangement of responsibilities, and although the Act makes very careful provision for the protection of the rights of the individual, the mental review tribunals include a psychiatrist as well as a lawyer and layman. In several provisions one of the examining doctors must be a psychiatrist "approved . . . as having special experience in the diagnosis or treatment of mental disorders."

Patients concerned in criminal proceedings

Magistrates' courts are, as we have seen, empowered to make an order for the detention in hospitals of those accused of criminal offences and suffering from mental disorder; in the cases of the more serious conditions (mental illness and severe subnormality), such an order may be made without recording a conviction, but not in the case of subnormality or psychopathic disorder. Great interest attaches to the further provision that courts of assize and quarter sessions may make an order subject to restriction of discharge either without limit of time or for a specified period; offenders of fourteen or over may be committed in custody to quarter sessions where it is felt that an order restricting discharge should also be made. This option of restriction for a limited or unlimited time is perhaps intended to allow a further approach to the dilemma that courts are very reluctant to commit anyone to indefinite detention and that many doctors hold that treatment is ineffective during a fixed and relatively short period of detention. Much more experience is needed before doctors can form reliable views about such a question. In foreign countries, such as Denmark, in which psychopaths are detained for an indefinite period, release frequently occurs at about the time when the patient would have been released from the long sentence of imprisonment which the serious crime would usually attract in a normal offender; in some cases, the threat of indefinite detention may not be essential for successful treatment. In this context, the extremely important Part II of the Act, easily overlooked because less spectacular, deals with the provision by local authorities of residential accommodation, training and occupational facilities. It must be stressed that the successful treatment of the mentally disordered offender calls for flexibility and a wide range of facilities and degrees of control and supervision which should be available with the minimum of formalities. Section 72, which deals with the transfer to hospital detention of those serving sentences of imprisonment or detention in approved schools, etc., may be a valuable aid to flexibility.

Section 62 makes a welcome contribution to the vexed question of medical reports to courts, by providing that if the accused is represented, a copy shall be shown to counsel or solicitor, but, if not, the *substance* of the report shall be disclosed to him or to the parents if a juvenile.

It should be noted that the Act leaves intact section 4 of the Criminal Justice Act (which allows offenders to receive medical treatment as a condition of probation) and section 26 (which allows admission to hospital as a condition of bail). The latter has not been used a great deal to obtain medical reports, even in cases in which the supervision offered by a hospital might have been thought sufficient protection of the public; and the former, though widely used, has sometimes led to difficulty when the court did not feel satisfied about the patient discharging himself quite quickly. The present Act offers additional powers, but it is hoped by most doctors that this will not reduce the tendency of courts to allow treatment of the subnormal and other disordered offenders by voluntary and persuasive methods, rather than compulsion.

Psychopathic disorder

The most problematical section of the Act, both for lawyers and for doctors, is that which deals with psychopathic disorder. The definition allows a wide range of interpretation, even with the addition that a person shall not be so adjudged "by reason only of promiscuity and other immoral conduct." Particularly controversial is the provision to detain compulsorily those with psychopathic disorder or subnormality under the age of twenty-one who have not been charged with an offence. The procedure to detain them compulsorily for twenty-eight days has been widely welcomed since it provides an opportunity to persuade them to accept treatment voluntarily, and allows a period for effective investigation and research which will lead to medical progress; but further detention is viewed by many doctors with mixed feelings. The object of this was presumably to comply with the Royal Commission's concept of "providing training compulsorily when the diagnosis is made while the patient is still young, when training is most likely to be successful."[2] But we do not yet know which age group is most likely to benefit; there are foreign psychiatrists with experience of compulsion who would regard psychopaths of sixteen to twenty-one as among the most difficult to treat; they may be protected from the worst consequences, but it may not be until twenty-two or twenty-three that they mature enough to profit from treatment. Rebellious behaviour which, in spite of appearances, turns out to be surprisingly transitory, is not uncommon at this age; and in family conflicts, the consent of parents to some form of compulsion may be too freely given. Since sexual maladjustment is often at the root of such behaviour, institutional treatment may increase rather than diminish the difficulties. In practice this clause, which looks to the future when we have more knowledge and skill, is likely to be used with great caution if only because, apart from the question of review, compulsion can only be used when an

[2] p. 9, para. 31.

institution is available, and in the freer atmosphere of the modern hospital, the psychopath is especially unwelcome.

There are on the other hand psychiatrists who object that where detention is unavoidable, the psychopath is unlikely to be suitable for discharge at twenty-five. The Act provides for further detention at this age if "likely to act in a manner dangerous to other persons or to himself." Doctors are apt to have a somewhat personal view of what constitutes "dangerous" behaviour; relating it especially perhaps to sexual or aggressive behaviour. It is notable that the courts, in restricting release in another context, are required to consider among other things "the risk of his committing further offences" rather than danger.

Special hospitals

The sections dealing with psychopaths, offending or otherwise, clearly offer a challenge to the medical profession, and are presumably intended to do so. Implicitly, the Act places considerable confidence in the profession, and especially its more experienced members, as the Royal Commission did explicitly, to make a proper use of the provisions. Flexibility is difficult to combine with very precise formulations. Some psychiatrists have regretted that the Act, although referring to the recognition of some doctors as experienced in the diagnosis or treatment of mental disorders, does not make any provision for a medico-legal board or similar high authority such as exists in foreign countries which could consider the relation of medicine and the courts.

Whether this challenge is met, or whether these sections will remain dead letters, seems to depend on a number of factors. Doctors tend to look for signs of what the Act may be made to mean and how it can be applied. It will be remembered that the category of moral defective has existed for many years; even twelve years ago, a joint committee of the B.M.A. and the Magistrates' Association [3] recommended a more vigorous use of this legal provision, though without result. Although the Act gives wide powers to doctors, at least in the first instance, the treatment of psychopathic disorder is only a small part of psychiatrists' work, and many quite rightly hold that they should be treated in other institutions by someone else. Yet the reality is that there are many persons in the community who, for example, have recovered from a psychosis at the cost of permanent damage to the personality, and who limp along with occasional visits to prison; and the open-door policy is likely to swell their number. Penrose [4] showed that in all countries there is an inverse relation between the number of mental hospital beds and prison beds. The first essential is

[3] Report of the Joint Committee on Psychiatry and the Law of B.M.A. and Magistrates' Association, "Interpretation of Definitions in the Mental Deficiency Act," B.M.A., 1947, p. 10.

[4] Penrose, 1939, Brit.J.Med.Psychol., 18.1.

that enough doctors should interest themselves in this type of case. The Act has the merit of offering no unnecessary barriers, especially at the outset, to those who are willing to undertake such difficult work.

Secondly, much will depend upon the availability of special units. The Act empowers the Minister to provide institutions for those who require treatment under conditions of special security, and a working party has been set up to consider the future role of the "special hospitals" of Broadmoor, Rampton and Moss Side. At present, the latter two hospitals receive some mental defectives admitted direct from courts, but the majority of patients are transferred from ordinary mental deficiency hospitals as too difficult or dangerous to manage without special security. Broadmoor, however, mainly receives directly those who are found guilty but insane or unfit to plead, and a smaller number of those who become insane while serving a prison sentence and are unsuitable for local hospitals. The geographical isolation of such national hospitals makes it difficult to provide contact with relatives, and make social investigations or resettlement plans. The medical view tends to stress that, once detained, treatment considerations shall determine where a patient goes rather than the method of committal. Much will depend upon the relation of these special hospitals to a framework perhaps of regional institutions in the National Health Service with open and moderately secure sections for less difficult and more temporary patients.

The third and perhaps most serious barrier to implementation is lack of knowledge about the prevalence of psychopathic disorder, and its relation to subnormality, its definition, prognosis and treatment. Further research is essential but is not referred to in the Act. That apparently similar cases may develop very differently was recently shown in a follow-up of criminal psychopaths.[5] Yet psychopaths are dealt with at present, those whose behaviour threatens themselves in hospitals, those who threaten others in penal institutions, and an unknown number who are drug addicts or vagrants or persistently cruel to their families in the community. Medical treatment must lean heavily on methods already found effective and on better allocation within the system. The first need is perhaps for uniform standards of diagnosis and for the pooling of knowledge of many experienced workers in hospitals, prisons and schools who at present go their way in isolation from one another. It has been widely suggested that diagnostic centres should be established with full security and facilities for short-term treatment, which would act as centres for research, allocation of committed or transferred cases, for exchange of views and interdisciplinary staff training.

Whatever progress is made in this way in the medical services,

[5] Gibbens, T. C. N., Pond, D. A., and Clark, D. Stafford-, J.Ment.Sc., 1959, Vol. 105, pp. 108–115.

there will remain the problem of communicating with the courts and ensuring that the best advice is offered at an early stage. It may indeed become more acute. Such centres might provide remand investigations in association with remand centres. But the use which is made of the Act will ultimately depend upon the provision of treatment institutions and units.

T. C. N. Gibbens.

III. *Jurisdiction in Lunacy*; *The New Look*

When Part 8 of the Mental Health Act, 1959, comes into operation, the jurisdiction in lunacy will get a new look but there will be no wind of change.[38]

To appreciate the new, one must first look at the old.

The present jurisdiction

At the present day the jurisdiction is partly statutory and partly an inherent jurisdiction derived from the royal prerogative, exercised by those to whom it has been entrusted by mandate under the Sign Manual. The origin of the prerogative jurisdiction is lost in the mists of antiquity, and it is outside the scope of this article to try to penetrate those mists, but it can at any rate be said that the right and duty of the King to protect the estates of lunatics[39] was recognised by the Statute de Prerogativa Regis.[40] The inherent jurisdiction could only be exercised in respect of persons who were found, after a solemn inquiry ("inquisition"), to be of unsound mind ("lunatics so found") and the inquisition was followed, if the subject was found to be a lunatic, by the appointment of a person to whom the management of his affairs, and perhaps also of his person, was committed ("the committee"). Many persons suffer from a degree of mental disorder not amounting to unsoundness of mind but sufficient to make them incapable of managing their affairs, and these were outside the lunacy jurisdiction. Moreover, the procedure by inquisition was complicated and expensive, and the result was that a large class of persons, lunatics in fact though not so found, and persons who, although not lunatics, had become incapable of managing their affairs, had no protection so far as their estates were concerned.

This unhappy state of affairs continued, except for some minor legislation relating to small estates, until the Lunacy Act, 1890 (53 Vict. c. 5). This Act, in so far as it related to the estates of mentally incompetent persons, regulated the conduct of inquisitions,

[38] The date has not yet been fixed but is unlikely to be long delayed.
[39] In the context of the law of lunacy the expressions "lunatic" and "person of unsound mind" are interchangeable; see Mental Treatment Act, 1930, s. 20 (5).
[40] Temp. incert., cc. 11, 12.

introduced a much simplified procedure whereby orders could be made for the protection of the estates of certified patients and persons who, through mental infirmity arising from disease or age, were incapable of managing their affairs, and conferred various specific powers on the judge in lunacy. The Act provided that the statutory jurisdiction was to be exercised by the Lord Chancellor and judges of the Supreme Court for the time being entrusted under the Sign Manual with the care of the estates of lunatics. The person appointed under the simplified procedure to carry out many of the duties of a committee is called, somewhat inaccurately, the receiver of the patient's income.

Although the reforms thus introduced were in every way praiseworthy, the actual drafting of this part of the Act of 1890 was unworthy of the occasion. The Act is amorphous and verbose; the draftsman often fails to make it clear whether the word "lunatic" in a particular context is or is not intended to include a person whose only infirmity is that he is incapable of managing his affairs; and although many powers are expressly conferred, others are unaccountably omitted. Thus, although a power to order the sale of a lunatic's property is given, no power is given to purchase property on behalf of a lunatic.

Notwithstanding these obstacles, the procedure introduced in 1890 has worked well. Soon after the Act became law, it was held that the Act was an enabling Act, not restrictive, and that the inherent jurisdiction was not superseded [41]; and in 1908 the Act was amended to enable the inherent jurisdiction to be exercised although there has been no inquisition.[42] The result is that any gaps in the statutory jurisdiction are filled by calling in aid the inherent jurisdiction, and thus by hook or by crook almost any transaction which is for the patient's benefit can be sanctioned.

Two other sources of statutory jurisdiction should be mentioned. By section 171 of the Law of Property Act, 1925, the judge in lunacy may direct a settlement of a patient's property. And secondly, under the Trustee Act, 1925, the judge in lunacy has a limited concurrent jurisdiction with the High Court to make orders under that Act.

Although the system works, it is appallingly complicated. The student has first to tread a tortuous path through lunatics so found and not so found, persons of unsound mind (it will take him quite a time to discover that this is a synonym for a lunatic), persons incapable of managing their affairs, inquisitions, committees, receivers and so forth. He will then find that in practice inquisitions are almost a thing of the past [43] and that in nearly every case jurisdiction is established under one of at most three categories.[44]

[41] *Re Sefton* [1898] 2 Ch. 378.
[42] Lunacy Act, 1908, s. 1.
[43] There was one inquisition (probably the last) in 1959.
[44] Certified patients, persons incapable of managing their affairs, and mental defectives. There are also a few Broadmoor patients.

The new jurisdiction

The Mental Health Act, 1959, repeals all the existing Lunacy Acts. Under the new dispensation, the same kind of people will be looked after in the same kind of way, but the approach will be very much simpler. Perhaps the most interesting change juridically is that the inherent jurisdiction and the inquisition will disappear; they are not in terms abolished but they will die a natural death. As mentioned above, the inherent jurisdiction can only be exercised by mandate under the Sign Manual, and as it is intended that after the Act comes into force no mandate will be conferred, this jurisdiction will lie dormant. Likewise, there will be no person competent to hold an inquisition. Instead of deriving their authority direct from the sovereign, the judges will be nominated by the Lord Chancellor.

Another major simplification is the manner in which jurisdiction will be established. Instead of different categories of patients, there will in every case be a simple test: whether a person is, by reason of mental disorder as defined in the Act, incapable of managing and administering his property and affairs.

The greatest gain of all is the arrangement and simplicity of this part of the Act. In place of a morass of verbiage, the new code is compressed into twenty-two sections, most of them quite short and expressed with a remarkable lucidity and economy of words. Not only is the essence of the various provisions of the various Lunacy Acts thus distilled into these few sections, but they include also the essentials of section 171 of the Law of Property Act, 1925 (repealed by the new Act), authorising the judge to direct a settlement of a lunatic's property, and which section itself contains no fewer than nine subsections. The general scheme of the new code is to confer on the judge a wide power in general terms to do anything expedient for the benefit of the patient or members of his family or other persons for whom he might be expected to provide, followed by certain express powers which are to be without prejudice to the overriding general power. In fact, it is difficult to think of any power which the judge would want to exercise which is not to be found in the specific powers.

The only section which is likely to cause difficulty is section 107, the object of which is to preserve the interests of persons who would have succeeded to property of the patient on his death if that property had not been disposed of in the exercise of the powers of the judge under the Act. The subject is technical and complicated and difficult questions may arise as to the precise operation of the section in particular circumstances.

The jurisdiction under the Trustee Act, 1925, is not materially affected, although certain sections of that Act have had to be rewritten to fit in with the new code.

In what has been said above no mention has been made of

the Master of the Court of Protection, which is not in fact a court but an office of the Supreme Court. Ever since 1891 the Master has been empowered to exercise all the jurisdiction of the judge relating to management and administration and does so. He also exercises the jurisdiction under the Trustee Act, 1925. The result is that the functions of the judge substantially consist of disposing of applications for a settlement of a patient's property (which is reserved to the judge) and a few matters which are not regarded as management and administration, such as sanctioning divorce proceedings on behalf of a patient, and hearing appeals from the Master. The new Act makes no material change in this respect, but the Master loses his title of the Master in Lunacy and becomes the Master of the Court of Protection.

Finally, the present Rules of the Court of Protection, which rival the Act of 1890 in lack of arrangement and obscurity, are in process of being entirely redrafted and given a new look worthy of their new setting.

Raymond Jennings.

NOTES OF CASES

The Hinchy Case

The problem which arose in *I. R. C.* v. *Hinchy*[1] is not uncommon today; what degree of ambiguity must a court discover in a statutory provision, whose normal meaning produces an apparently absurd result, before that court can give the provision another and more reasonable meaning? Under section 25 (3) of the Income Tax Act, 1952, a person who neglects to deliver a true and correct return which he is required to deliver is liable to a penalty of £20 and "treble the tax which he ought to be charged under this Act." The Crown contended that the words quoted meant three times the tax on his income for which the offender was assessed in the relevant tax year. Whilst this construction leads to a not unreasonable result in the case where a man makes no return and thus manages to avoid tax on the whole of his income, the penalty is inappropriate in a case where the return relates to some other person's income, *e.g.*, when the secretary of a company fails to make a return which he is liable to make in respect of the company's affairs.

As in 1910 [2] the House of Lords held that the predecessor of this subsection was apt to cover a case where a man makes a return but it is inaccurate, the penalty is even more inappropriate in the case of a man with a large income, who understates it by a few pounds. Even with comparatively modest figures such as existed in Mr. Hinchy's case, the penalty can be wholly unreasonable in relation to the offence. Mr. Hinchy was a salaried employee of the Crown and in addition he and his wife had some bank interest. For 1951–52 Mr. Hinchy made an income tax return in which he understated that bank interest by some £30. His code number for P.A.Y.E. purposes was calculated on the basis that he had £21 untaxed interest. In fact he had £51. At the time he was never assessed at all as both he and the Revenue were satisfied with the deductions under P.A.Y.E. When the true facts came to light the Revenue made formal assessments on him, both in respect of his salary and the previously undisclosed interest, and the total tax assessed on him for the year in question was £139 11s. 6d., of which £14 5s. represented tax on the extra interest.

In these circumstances the Revenue brought an action in the High Court claiming a penalty of £438, *i.e.*, £20 plus three times £139 11s. 6d., a penalty which was more than thirty times the tax on the undisclosed income. Throughout the case the Crown made

[1] [1960] 2 W.L.R. 448 (H.L.); [1960] 1 All E.R. 505; reversing [1959] 2 Q.B. 357 (C.A.), who in turn varied Diplock J. [1959] 1 Q.B. 327.
[2] *Att.-Gen.* v. *Till* [1910] A.C. 50.

it clear that they had no intention of asking Mr. Hinchy to pay as much as £438. The Revenue in the exercise of their statutory discretion would, when judgment was given, mitigate the penalty to the figure they thought appropriate.[3]

All three courts who heard the case were unanimous in deploring legislation which provided for such an arbitrary penalty. The answer of the Crown, that no great harm was done because the Commissioners of Inland Revenue had power to mitigate the penalty and they, like all civil servants, were extremely reasonable men, did not carry much conviction to the judiciary. Hence both Diplock J. and the Court of Appeal leant over backwards to find a construction for the subsection which produced a more reasonable result.

Diplock J. held that as the full amount of tax for which Mr. Hinchy was liable had been assessed on him before the writ for penalties was issued, there was no longer any sum "for which he ought to be charged" and therefore the only penalty exigible was £20, for which sum he gave judgment.

The Court of Appeal rejected this view on the ground that the penalty was payable when the offence was committed and not when the writ was issued. A unanimous court further found itself able to construe "treble the tax which he ought to be charged" as treble the tax he was originally undercharged by reason of the incorrect return. They pointed out that under other sections of the Income Tax Act, 1952, which deal with fraudulent offences, the measure of the penalty is three times the tax lost by the fraud; hence they felt that they could fairly construe the words in section 25 (3) in a similar way as otherwise the penalty for delivering an incorrect return would in most cases be considerably larger than the penalty for a fraudulent one.

The House of Lords, however, were unable to find any ambiguity and unanimously held that the construction put upon the section by the Crown was the only one possible, however unreasonable the result might be. They pointed out that this phrase was first introduced into the taxing Acts more than a hundred and fifty years ago and it did not surprise them that in those days penalties were neither adjusted harmoniously to each other nor proportional to the gravity of the offence. They agreed with the Court of Appeal in rejecting Diplock J.'s construction on the ground that the penalty was due when the offence was committed. They pointed out, however, that when Mr. Hinchy made his inaccurate return he had never been assessed at all on his income for that year, nor indeed was he ever assessed for tax to that year until the error had been discovered. Hence it was impossible to predicate what tax had not

[3] The practice of suing for more than the Revenue intended to recover was much criticised and it was later announced in Parliament that in future they would only sue for the amount they expected the offender to pay.

been charged by reason of the incorrect return and certainly quite impossible to do so when he committed the offence.

The House of Lords, however, added their weight to the previous judicial criticisms of this legislation and it is satisfactory to note that these and other criticisms have resulted in the current Finance Bill containing a completely new code of penalty provisions for income tax offences for which the penalty will in future be either a fixed sum or proportional to the tax lost by the offence.

It may be wondered why the Revenue fought this case so strenuously, particularly as it is believed the amount they ultimately required Mr. Hinchy to pay was little more than the £62 15s. for which the Court of Appeal gave judgment. The reason is that this subsection has been used for years as the Revenue's main weapon in dealing with back-duty claims—cases in which a taxpayer has been discovered to have understated his income and paid too little tax in consequence. Except when the Revenue can prove fraud or wilful default, they can only claim arrears of tax and penalties for six years prior to the date of assessment, but taxpayers who are discovered to have understated their income have frequently been doing it for years. After the offence has been discovered, investigation usually takes a considerable time so that when the Revenue do know the true facts (or at any rate as near the truth as they are ever likely to get) they will usually only be in time for assessment on two or three years, except on the basis of fraud or wilful default, which takes a good deal of proving. So long as the offender's income was substantial, the Revenue adopted an alternative method of dealing with arrears of tax which were statute-barred, namely by assessing the penalty for the years in which they were in time to include an appropriate figure for the tax lost in the years for which they were out of time. A further advantage to the Revenue was that they could, in general, dictate the terms of the settlement they thought appropriate in each particular case as the penalty in these cases was completely in their discretion, and could be out of all proportion to the offence. Whilst no one suggests they did not endeavour to exercise these very extensive powers reasonably, there have been cases where a genuine difference of opinion existed between the Revenue and those advising the offender as to the extent of his liability; the latter tended to feel in this type of case that their client did not get justice. The provisions in the current Finance Bill make the penalties reasonable but give the Revenue power in certain circumstances to recover tax lost by the taxpayer's neglect more than six years before. This is obviously a great improvement.

The construction put upon the section by Diplock J. and the Court of Appeal brought the Revenue's former practice to an abrupt end and all back-duty negotiations were held up pending the appeal to the Lords. The Comptroller and Auditor-General

commented in a recent report [4] on the drop in receipts from this source which was attributed to this uncertainty about the law. Had the House of Lords affirmed the decision of the Court of Appeal and retrospective legislation had not been passed, it is estimated that over £2,000,000 of back-duty would have been irrecoverable. The judgment of the House of Lords followed by the new legislation, which applies the new provisions to all unsettled claims and is thus retrospective in operation, has removed this possibility. But those persons against whom these claims are outstanding may not be altogether satisfied with a feature of the British doctrine of precedent which was illustrated in this case. In the two lower courts Mr. Hinchy appeared in person; in the House of Lords he neither appeared nor was he represented and no argument was heard by their lordships other than that put forward by those representing the Crown. No counsel was invited to address the court as *amicus curiae*. Yet by this judgment, which reversed a unanimous Court of Appeal, the cases of a large number of other people, involving substantial sums of money, were automatically decided against them without any argument on their behalf. Most lawyers who study the reasoning of the House of Lords will agree with it; one wonders whether justice seems to have been done to those persons whose claims were thus determined in their absence without argument for their side.

G. S. A. W.

University Discipline and Natural Justice

In modern times the English courts have shown a marked reluctance to intervene in disputes arising out of the internal affairs of universities. They may justify their refusal to intervene by characterising an exercise of disciplinary authority as non-judicial,[1] or by denying that the person aggrieved has any legal or equitable right on which to found a justiciable claim,[2] or by pointing to the jurisdiction of the visitor as an effective alternative remedy to mandamus [3]; but at bottom there lies the view that judicial regulation of this area of activity would be contrary to public policy.[4] So rare are legal actions against university authorities by disappointed examinees and suspended students that the judgment of the Judicial Committee of the Privy Council in *Ceylon University* v. *Fernando* [5] has aroused widespread interest.

The university statute provided that where the Vice-Chancellor was satisfied that a candidate for an examination had obtained prior

[4] See Report of Comptroller and Auditor-General for year ending March 31, 1959.
[1] *Ex p. Death* (1852) 18 Q.B. 647.
[2] *Cf. Thomson* v. *London University* (1864) 33 L.J.Ch. 625.
[3] See *R.* v. *Dunsheath, ex p. Meredith* [1951] 1 K.B. 127, and authorities there cited.
[4] See, *e.g.*, *Thomson's* case (*supra*) at p. 635, *Meredith's* case (*supra*) at p. 132.
[5] [1960] 1 W.L.R. 223; also reported [1960] 1 All E.R. 631.

knowledge of the contents of any examination paper he could suspend the candidate from the examination or remove him from any pass list, and was to report the matter to the Board of Residence and Discipline. Upon receipt of such a report the Board was empowered, *inter alia*, to suspend the candidate from any university examination. In 1952 the respondent, F., sat for the final examination for the B.Sc. degree of the University, and obtained marks that would have given him first-class honours. After the examination was over, however, Miss B., a fellow-student, made allegations against F., pointing to his having had previous knowledge of a passage in German which had to be translated in one of the papers. The then Vice-Chancellor, Sir Ivor Jennings, decided to set up a commission of inquiry, consisting of himself and two other persons of high standing. The Commission interrogated several persons, including Miss B., in the absence of F., and F. was invited to appear and did appear before it on two occasions. The Commission found the allegations against F. proved and reported him to the Board, which suspended him indefinitely from all university examinations. F. thereupon brought an action against the University, claiming a declaration that his suspension was wrongful and other relief. His principal contentions were that he had been given neither adequate notice of the charges against him nor an adequate opportunity of meeting them, so that his suspension was contrary to natural justice. His action was dismissed by the court of first instance, but he succeeded on appeal to the Supreme Court of Ceylon.[6] The Privy Council allowed the University's appeal and restored the decree of the court of first instance

Three features of the hearing before the Judicial Committee must be borne in mind when the authority of the decision is weighed. First, the respondent was unrepresented. Secondly, in the event the Judicial Committee did not find it necessary to determine whether the courts had any jurisdiction to grant the declaratory relief sought. But it would certainly not be easy to spell out from the charters and statutes of English universities any legal right of an examinee that could be unlawfully invaded; and if the courts were prepared to piece together a contract from a student's entry for an examination and the university's acceptance of his entry they would still have to be persuaded that the contract contained implied terms imposing on the university procedural duties, observance of which was a condition precedent to a valid disqualification of a candidate.[7] Thirdly, the appeal was determined

[6] (1957) 58 New L.R. 265.

[7] London University has no regulations relating to disqualification of candidates. However, on entering for an examination candidates receive a notice informing them that if they engage in specified forms of misconduct they will render themselves liable to disqualification and to exclusion from all further examinations of the University. It is understood that allegations of misconduct are investigated by one or more senior officers of the University. A report is made to the Academic Council, which recommends to the Senate what action, if any, should be taken on the matter.

on the footing that the Vice-Chancellor's functions were quasi-judicial; the appellants abandoned their former contention that his functions were purely administrative, and no argument was addressed to the Judicial Committee on the point. Proceeding on this basis, the Judicial Committee (whose opinion was delivered by Lord Jenkins) held that having regard to the amplitude of the Vice-Chancellor's discretion he was entitled to adopt such procedure as he thought best for inquiring into the charge, subject to the basic requirements that the accused student was to be given a fair opportunity to state his own case and to "correct or controvert any relevant statement brought forward to his prejudice."[8] It found that the respondent had in fact been adequately informed of the case he had to meet. Moreover, his interviews with the Commission had been fairly conducted. And since the Vice-Chancellor was not obliged to treat the matter as if it were a trial in a court of law he could properly inform himself by questioning witnesses without having to invite the respondent to be present. But should not the respondent have subsequently been offered the opportunity of cross-examining Miss B. for the purpose of testing the accuracy of her vital evidence? The Judicial Committee held that natural justice did not require the Vice-Chancellor to tender her for cross-examination in the absence of a request to do so by the respondent, who had had the opportunity to make such a request between his first and second interviews; though it observed that the objection to the procedure adopted might have been stronger if the request had been made and refused,[9] and it added that F. "might have fared better if the charge against him had been tried in accordance with the more meticulous procedure of a court of law."[10]

With all respect, the least convincing passage in the judgment is that which draws attention to the respondent's failure to ask for permission to confront Miss B. before the Commission. If he had been told by the Commission that he could have questioned her before it, he would have had no ground for complaint. Similarly, if he ought to have known that he would have been permitted to put questions to her, his failure to ask leave to do so could be construed as an implied waiver of his rights. But it is very doubtful whether such knowledge ought to be imputed to a student placed in the respondent's position; he might well have thought that to make such a request would do him more harm than good in the eyes of the Commission. If, then, natural justice demanded that F. be given the opportunity of cross-examining Miss B., it would seem that the Vice-Chancellor ought to have informed F. of his rights. If, on the other hand, natural justice did not so demand, there

[8] *De Verteuil* v. *Knaggs* [1918] A.C. at 560, cited with approval at [1960] 1 W.L.R. 232.

[9] [1960] 1 W.L.R. at p. 235.

[10] *Ibid.* at p. 236.

would appear to be nothing improper in refusing an express request by F. to be allowed to cross-examine Miss B.

Should the courts require similar investigations of charges of cheating by university students in this country to be conducted in conformity with natural justice? It is submitted that they should, and that they should not be deterred by the wording of university regulations (or the absence of such regulations) on the matter, or by the difficulty of identifying a legal peg on which the aggrieved could hang a justiciable claim. It is true that it is hard to detect any consistent principle determining the classes of situations in which a duty to observe the rules of natural justice will be held to arise by implication. The slum property owner's tumble-down house must remain standing until these rules have been complied with,[11] but employees may be dismissed from their jobs for dishonesty and children may be expelled from school without being given any prior opportunity to be heard in their own defence. Nevertheless, the governing principle ought to be that authorities empowered to make decisions that are seriously detrimental to the liberty, proprietary rights, livelihood, status or reputation of individuals should be required to give prior notice and opportunity to be heard to those who are directly affected, except where the imposition of such duties would be impracticable or manifestly contrary to the public interest or parliamentary intent; and the importance of imposing such duties becomes greater, not less, where the discretion of the deciding authority is so wide as to be almost unreviewable on its merits. But if the disciplinary functions of university authorities should be exercised according to natural justice, does it follow that the hearings they conduct must have all the characteristics of judicial proceedings? Cross-examination may be the best way of shaking the testimony of an unreliable witness, and one who faces a serious charge ought not lightly to be denied such an advantage. On the other hand, the truth may be reached by more than one route; the courts have never laid down the rigid rule that oral hearings before administrative and domestic tribunals must inevitably provide for the right of cross-examination[12]; a tribunal composed of responsible and experienced persons who have no personal involvement in the issues before them can normally be expected to do justice by following inquisitorial methods of investigation; and there may be disadvantages in encouraging students to believe that the courts will readily accept invitations to find fault with the internal procedures of the universities. The scales are therefore tilted against the assertion of a general right of cross-examination in such cases, but only by a fine margin. And it may be undesirable for the courts to lay down too precisely what is

[11] See *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B.(N.S.) 180 for the common-law rule.

[12] See *Judicial Review of Administrative Action*, 111.

implicit in the right of the accused to "correct and controvert any relevant statement brought forward to his prejudice."

S. A. de Smith.

Blanket Charges of Conspiracy in the Criminal Law

In recent years there appears to have been an increasing number of prosecutions concerning commercial trading frauds and conduct tending to subvert the course of justice. In such cases the charges have frequently included a general count for conspiracy. The Court of Criminal Appeal has more than once protested against the tendency to bring blanket charges of conspiracy relating to the conduct of parties over a number of years in relation to a variety of transactions, but prosecutors continued to insert such counts, and the cases of *R.* v. *Meyrick and Ribuffi* [1] and *R.* v. *Hammersley* [2] did nothing to discourage them. Now we have a very firm decision of the Court of Criminal Appeal in *R.* v. *Dawson*, *R.* v. *Wenlock*,[3] restating the court's position on these counts of conspiracy.

In addition to a general count alleging conspiracy to cheat and defraud, there were fourteen charges against George Dawson, including four counts for false pretences, six for obtaining credit by fraud, one for fraudulent conversion, and three for other offences. He was convicted of conspiracy and three counts of false pretences, five counts of obtaining credit by fraud, and one of fraudulent conversion; and sentenced to six years' imprisonment on the conspiracy count and to lesser concurrent terms on nine other counts. Albert Wenlock, who was charged with him for the conspiracy, together with a count for false pretences and for aiding and abetting Dawson in obtaining credit by fraud, was convicted on all these charges and sentenced to two years' imprisonment. Both men appealed.

Dawson appealed on the grounds, *inter alia*, (1) that the judge had misdirected the jury in failing to tell them that alleged acts of misconduct in connection with an amorphous agglomeration of entirely separate transactions between different and unassociated people at different times and places could not be tried as conspiracy; and (2) that there was a misdirection in that the judge told the jury to consider the whole of the circumstances of the case first in regard to the charge of conspiracy, and then to consider the substantive counts when they had disposed of the first count. Wenlock appealed against his conviction on the ground, *inter alia*, that the conspiracy count in the indictment was bad in law, in that, although it purported to charge a general conspiracy to cheat and defraud over a period of three years, in reality a number of separate conspiracies were charged in one count, which made it bad for duplicity.

The arguments against the conspiracy count found favour in the

[1] (1929) 21 Cr.App.R. 94.
[2] (1958) 42 Cr.App.R. 207.
[3] [1960] 1 W.L.R. 163; [1960] 1 All E.R. 558.

Court of Criminal Appeal, and the convictions of both men for conspiracy were quashed. Wenlock was freed, but George Dawson's conviction on substantive charges remained, though his sentence was reduced from six years to four. The appeal hearing lasted two weeks, and the trial itself had occupied nine weeks. It was, as the court remarked, "a case of very great length and considerable complexity." Finnemore J. delivered the judgment of the court, which was reserved. Davies and Hinchcliffe JJ. were the other judges.

On the law of criminal conspiracy, the court had some quite important things to say. It spelled out with some particularity the objections to general charges of conspiracy. There were three reasons, it said, why they were undesirable:

(1) if there are substantive charges which can be proved, it is in general undesirable to complicate and to lengthen matters by adding a charge of conspiracy;
(2) it can work injustice because it means that evidence which would otherwise be inadmissible on the substantive charges against certain people becomes admissible;
(3) it adds to the length and complexity of the case so that the trial may easily be well nigh unworkable, and impose a quite intolerable strain on both the court and the jury.

The judge had told the jury to look at the whole of the case, which really meant the conspiracy, and, having formed an opinion about that, to proceed to a consideration of the substantive charges. The court felt that was not the proper course, which was the direct opposite—"to proceed the other way, to deal with the substantive charges and then proceed to see how far the conspiracy count should be there at all and if it is made out." The cases of *Luberg*,[4] *Boulton*[5] and *R.* v. *Cooper and Compton*[6] were cited in support of this approach, and *R.* v. *Meyrick and Ribuffi*[7] and *R.* v. *Hammersley*[8] were distinguished, on what it is conceived are rather slender grounds: in each of those cases, it is said, the court held that there was only one conspiracy, even though several persons took part in it independently of one another, as in the former case, or it lasted a long time and involved many incidents, as in the latter case. In the present case, it was held there was not one conspiracy but a number of conspiracies. Dawson was dealing with orange juice, buses, bogies, landing vehicles, and bills of exchange to finance these transactions. He was dealing with different people at different times over a period of three years. In these circumstances, "it was no more correct to charge several conspiracies,

[4] (1926) 19 Cr.App.R. 133.
[5] (1871) 12 Cox C.C. 87.
[6] (1947) 32 Cr.App.R. 102. See also *R.* v. *West* [1948] 1 K.B. 709.
[7] Note 1, *supra*.
[8] Note 2, *supra*.

though they are called one conspiracy, than it is to include several different charges, in one count." [9]

So the conspiracy charge was shot down. There were various other grounds of appeal which the court accepted relating to some of the convictions on the substantive counts, but on these we make no comment.

What appears to have happened here is that, after an extremely able argument, the court has leaned the opposite way to the way it leaned in *Hammersley*, and gave weight to considerations which found little response in that case, but which had previously been most ably expounded by Humphreys J. in *R.* v. *Cooper and Compton*. The court got round *Meyrick and Ribuffi* and *Hammersley* by saying that in those cases it was held that there was only one conspiracy; but surely that is the very point for decision. In those two cases it may not be without significance that the conspiracies alleged were to defeat the ends of justice, and in both corrupt police officers were involved. As Mr. Durand said on behalf of Bellson the bookmaker, in the Hammersley appeal, "in cases of agreement to defeat the course of justice the law of criminal conspiracy has gone somewhat beyond the bounds of the ordinary criminal law because courts have been anxious to suppress the slightest acts likely to affect the security of the administration of justice." [10] We must be grateful to the *Dawson* case for giving the court an opportunity to weaken the authority of those cases which prompted counsel's remark; it remains for some other court to elevate this argument of counsel to the status of a judicial pronouncement.

J. E. Hall Williams.

Conditions and Promises
Aberfoyle Plantations Ltd. *v.* Cheng [1]

The condemnation by Williston of the failure of English lawyers sufficiently to recognise the difference between promises, on the one hand, and provisions affecting the operation of promises, on the other, has now appeared in an English book, *viz.*, Smith and Thomas, *Casebook on Contract*, p. 293. So important is it, and so little recognised, that it is worth restating. Williston in his *magnum opus* on *Contracts* adopts a terminology whereby the distinction is brought out by the use of the terms "promise" and "condition." He says (s. 665): "The difference between conditions and promises is so radical in its consequences that there is no excuse for a nomenclature which fails to recognise the distinction. In the English

[9] *Loc. cit.*, note 3, *supra*, at p. 172.

[10] *Loc. cit.*, note 2, *supra*, at pp. 210–211.

[1] [1959] 3 All E.R. 910; [1959] 3 W.L.R. 1011. A later case dealing with the distinction between conditions and covenants in leases is *Bashir* v. *Commissioner of Lands* [1960] A.C. 44.

books there has sprung up an astonishing use of the word 'condition' in the law of sales as meaning a certain kind of promise, and this usage has to some extent been followed in the United States. It cannot be too strongly deprecated." Williston's words first uttered in 1920 were largely ineffective in England for many years. The condemned usage has been extended beyond the law of sales, where it was given statutory recognition in the Sale of Goods Act, and accepted by the House of Lords in *Wallis* v. *Pratt*. It has hitherto been standard in our textbooks on contract law. In the United States, however, Williston's words contributed to the terminology of the *Restatement of Contracts* with its precise definition of "condition," clearly distinguishing a "condition" from a "promise." [2]

In the United States, moreover, cases are to be found illustrating specifically the importance of the distinction. In *U.S.* v. *O'Brien* [3] the Supreme Court had to deal with a provision, not uncommon in many kinds of engineering projects, whereby a contract for dredging operations could be annulled if the government engineer in charge was not satisfied with progress. The contract was annulled as a result of the engineer giving notice, but the government was not content with such rescission and brought an action for damages. Holmes J. said "It would be a very severe construction of the contract . . . to read the reservation of the right to annul . . . as importing a promise to use such diligence as should satisfy the judgment of the engineer." As a matter of construction, words which create a condition may also constitute a promise, but failure of a "condition" does not of itself logically entail the breach of a promise. This point is expressly stated in the judgment of Baldwin J. in *Lach* v. *Cahill*,[4] basing himself on Corbin as well as Williston and a number of previous Connecticut cases. "A condition is distinguished from a promise in that it creates no right or duty in and of itself, but is merely a limiting or modifying factor. If the condition is not fulfilled the right to enforce the contract does not come into existence."

The facts of *U.S.* v. *O'Brien* are paralleled by the cancellation clause in charterparties. Non-arrival of the ship by a specified date may give the charterer a right to cancel without exposing the shipowner to liability. The facts of *Lach* v. *Cahill* are paralleled in the recent case of *Aberfoyle Plantations, Ltd.* v. *Cheng*.[5] In the Connecticut case a contract for the sale of a house contained a clause stating that "This agreement is contingent upon buyer being able to obtain mortgage in the sum of $12,000 on the premises."

[2] A fuller analysis of the kinds of provisions affecting the operation of promises than is even provided by Williston may be found in an article in 15 Can.B.R., p. 309, where a more precise terminology, *e.g.*, employing the symbol "limitation" in addition to "condition" is suggested.

[3] 220 U.S. 321.

[4] 85 Atl. 2d 481.

[5] [1959] 3 All E.R. 910.

The buyer was unable to obtain a mortgage, but when he sought to recover the deposit the seller claimed that he was in default on the contract. The court held that the only promise that could be implied was one to make reasonable efforts to obtain a mortgage, and this the buyer had done. For the rest, the clause was a condition and not a promise. The *Aberfoyle* case was a Privy Council appeal from Malaya. On a sale of a rubber plantation clause 4 in the agreement provided " The purchase is conditional on the vendor obtaining a renewal of the seven leases described in the schedule hereto." The vendor had not obtained the renewal by the date fixed in the agreement for completion of the contract. The purchaser extended the time by a month, and on the expiry of the month rescinded and claimed the return of the deposit. The court made the point that the clause in question contained a " condition " as opposed to a " promise." Thus there is English authority for such a distinction, and, indeed, the terminology is adopted whereby the word " condition " is contrasted with the word " promise." The distinction arises in the case in a most interesting fashion. There is an established principle of equity that the courts will not hold the parties to a contract of sale of land to the exact performance of promises to complete the transfer and acquisition. So far as the date of completion is concerned, " time is not of the essence," and the parties are given a reasonable time in which to complete. The vendor maintained that clause 4 contained a promise like the promise to complete, and the liberality with regard to performance should be extended to it. This contention was rejected: Lord Jenkins, who delivered the opinion of the Board, drew a sharp distinction between clause 4, which, in his view, contained a provision making the whole contract of sale conditional on its fulfilment, and the clauses dealing with completion, which assumed the existence of absolute binding obligations.

The *Aberfoyle* case is, however, not the first to draw this precise distinction between condition and promise. Lord Jenkins formed his judgment on two earlier authorities, and, in particular, on the judgment of Maugham J. (as he then was) in *Re Sandwell Park Colliery Co.*[6] This case was concerned with the sale of property in a debenture holders' action, and its significance for the law of contract has hitherto escaped notice. And yet a dictum of Maugham J. makes the same point as that of Baldwin J. quoted above. The contract of sale had been entered into by the vendor as the receiver and manager of a colliery company appointed by the debenture holders. As was usual in such contracts, it contained a clause stating that the contract was subject to approval by the court. If not so approved, the contract was to become void with no liability to either party, and the purchasers were to be entitled to a return of their deposit. The wording of the clause in itself

[6] [1929] 1 Ch. 277.

made clear the distinction between " condition " and " promise," and that the clause contained a condition. There was some delay in getting the approval of the court, and ten days after the date fixed for completion the purchasers sought to rescind the contract for non-fulfilment of the clause relating to approval by the court. Ten months later the vendor asked the court to confirm the contract, and the court refused to do so. Maugham J. said " a clause fixing a date for completion is equivalent to a clause stating that completion shall be on that date or within a reasonable time thereafter. But there is no ground for a similar construction in the case of a condition upon which the validity of the contract as one for sale depends. . . . In general, and in the present case, there is no promise or undertaking by the vendor that the condition will be fulfilled " (at p. 282).

It is to be hoped that the significance of these cases as requiring a fresh approach to the problems of " conditions " in contracts will be appreciated. It is, however, not unlikely that more importance will be attached to Lord Jenkins' formulation of the principles relating to the time, when " conditions " in contracts of sale have to be fulfilled. The following is a restatement of Lord Jenkins' formulation. (i) The time fixed in a " condition " for its fulfilment will not be varied by any court. (ii) If no time is fixed then (a) if there is a date fixed for completion of the contract of sale in which a condition is contained, then the condition must be fulfilled by that date, (b) if no date is fixed for completion, then a reasonable time will be allowed for fulfilment of the condition. Presumably the last rule applies to all " conditions," whether contained in contracts of sale of land or not. Whenever legal relations are connected with lapse of time and no time is specified by the parties creating those relations, then the courts deem that the parties intended to specify a reasonable time. Perhaps rule (i) will also be extended to all " conditions ": the courts have been very reluctant to exercise any dispensing power from the exact provisions of the terms of a contract.

J. L. Montrose.

Exceptions Clauses and the Liability for Demurrage

In considering the effect of an exceptions clause in a charterparty on the question whether demurrage is payable the standard textbooks on the carriage of goods by sea agree as to the general rule of interpretation to be adopted.[1] Thus Scrutton states: " When once a vessel is on demurrage, no exceptions will operate to prevent demurrage continuing to be payable unless the exceptions clause is clearly worded so as to have that effect." To the decided cases

[1] Scrutton, *Charterparties and Bills of Lading* (16th ed., 1955), p. 353; Carver, *The Carriage of Goods by Sea* (10th ed., 1957), p. 830; Maclachlan, *Merchant Shipping* (7th ed., 1932), p. 445.

which establish the rule there must now be added the recent decision of *Union of India* v. *Compania Naviera Aeolus S.A.*[2]

But none of the books referred to mention the reason for the rule. This is to be found well stated by Lord Russell of Killowen C.J. in *Saxon Ship Co. Ltd.* v. *Union S.S. Co. Ltd.*[3] where he said [4] that it was one thing for a shipowner to take upon himself under the provisions of a charterparty the risk of the occurrence of circumstances which might greatly extend the period over which the lay-days would run. But it was another thing when the lay-days had expired and the charterer was in default, that there should be placed on the shipowner, for what might prove to be a much more extended period, the responsibility for causes with which he had nothing to do. It lay upon those who desired by the contract to place those exceptional risks on the shipowner to do so in language that was clear and unambiguous.

Whether the exceptions clause applies is, of course, a matter of construction. In two cases it has been held that it did. In the first, *Lilly & Co.* v. *D. M. Stevenson & Co.*,[5] a vessel was chartered to load a cargo of coal in sixty hours, weather permitting and Sundays and holidays excepted. A clause provided that if she were detained longer, demurrage was to be payable at 12s. 6d. per hour "unless detention arises from a . . . strike . . . at any . . . mine . . . with which the vessel may be booked." The lay-days expired on November 16, and a strike occurred on November 23 and lasted until December 11. The Court of Session held that the exceptions clause applied and that demurrage was not payable in respect of the period in which the strike was in operation.

The second case is *Rederiaktiebolaget Transatlantic* v. *La Compagnie des Phosphates de L'Oceanie* [6] in which one of the questions to be decided was whether a clause stating that if delay in discharging were caused by bad weather, "the lay days not to count during the period of such delay and demurrage not to accrue" could be relied on by the charterers although the ship was on demurrage. In giving judgment in the Court of Appeal Scrutton L.J. observed [7]: "It was argued that the . . . words [of the clause] were only intended to repeat the provision that lay days should not count, but if so, this repetition was quite superflous, and in fact demurrage could not accrue till the lay days expired. In my opinion the exceptions clause applies to the demurrage days, and days in the demurrage period on which loading was prevented by bad weather did not count in assessing demurrage." [8]

[2] [1960] 1 W.L.R. 297; [1960] 1 All E.R. 753.
[3] (1898) 4 Com.Cas. 29; the books cited above refer only to the decisions of the Court of Appeal and of the House of Lords in this case—(1899) 4 Com.Cas. 298 and (1900) 5 Com.Cas. 381 respectively.
[4] (1898) 4 Com.Cas. at 41.
[5] (1895) 22 R. 278.
[6] (1926) 17 Asp.M.L.C. 216.
[7] At p. 218. See also the judgment of Bankes L.J. at p. 217.
[8] The extent of the exceptions clause was not considered by Sankey J. in the court below: (1926) 25 Ll.L.R. 369.

On the other hand in *Saxon Ship Co.* v. *Union S.S. Co. Ltd.*[9] a charterparty incorporated a colliery guarantee which included a condition that "any time lost through . . . strikes was not to be computed as part of the loading time." The lay-days expired and shortly afterwards a strike started in the colliery from which the cargo of coal was to be supplied. Lord Russell of Killowen C.J. held that the charterers were liable for demurrage and were not protected by the words of the clause. In giving judgment he observed[10]: "One cannot avoid asking oneself why, if it was intended by the framers of this guarantee to place all these risks on the shipowner, not merely during but after the expiration of the lay days, that intention was not expressed in distinct terms. It would have been a very simple thing to have done so."[11]

In *Union of India* v. *Compania Naviera Aeolus S.A.*[12] a clause in a charterparty provided: "If the cargo cannot be discharged by reason of . . . a strike . . . of any class of workman essential to the discharge, the time for . . . discharging . . . shall not count during the continuance of such causes, provided that a strike . . . of the shippers' and/or receivers' men shall not prevent demurrage accruing if by the use of reasonable diligence they could have obtained other suitable labour. . . ." A strike occurred at the port of discharge three days after the lay-days had expired. McNair J. held that the exceptions clause did not operate to avoid the payment of demurrage. He distinguished *Rederiaktiebolaget Transatlantic* v. *La Compagnie des Phosphates de L'Oceanie*[13] on the ground that in that case not only were the words "demurrage not to accrue" used but there were also the words "lay days not to count." In the instant case he considered that the language was quite clear in that the proviso was dealing with some qualification against the non-counting of the lay-days, and although it was true that it did not use the words "lay-days" in the proviso, it expressed the same thought by the use of the words "shall not prevent demurrage accruing." Even if he were wrong on that point, he felt that the same result in law would follow, for it had not been stated in clear terms that the general rule should not apply.

By way of comment perhaps it may be said that the clearest words to satisfy the court that the general rule is to be excluded seem to be those to be found in *Lilly & Co.* v. *D. M. Stevenson & Co.*[14] Further, the date when the general rule was first laid

[9] (1898) 4 Com.Cas. 29.
[10] At p. 41.
[11] Later the case was decided on different grounds by the Court of Appeal and by the House of Lords, but both courts agreed with the decision of the Lord Chief Justice on the point mentioned above: (1899) 4 Com.Cas. 298 at 306 (C.A.); (1900) 5 Com.Cas. 381 at 395 (H.L.).
[12] *Supra.*
[13] *Supra.*
[14] *Supra.*

down would appear uncertain, for although Lord Russell of Killowen C.J. referred in *Saxon Ship Co. Ltd.* v. *Union S.S. Co. Ltd.*[15] to "the current of authorities," he did not cite them by name and they are not to be found elsewhere in the reports of the case. Perhaps he had in mind *Lilly & Co.* v. *D. M. Stevenson & Co.*,[16] which was decided a few years earlier. In the United States the rule seems first to have been laid down in a case of 1882 [17] and in another in the next year.[18] In a later case in 1926 the principle was stated by the Circuit Court of Appeals,[19] Fourth Circuit, in the following way [20]: "The rule is that, after demurrage has commenced to run, it will not be suspended by the occurrence of an event within the exceptions of the loading clause." Presumably therefore if the issue in *Union of India* v. *Compania Naviera Aeolus S.A.* had arisen in a court in the United States, the case would have been decided in the same way.

E. R. Hardy-Ivamy.

Wedding Presents

It is a pity that most reports of family disputes do not pay as much attention to the actual facts of the cases as to the "matters of principle" they deal with. Even the courts themselves, by only verbalising the minimum number of facts on which to base their decisions, frequently help to obscure the actual issues involved and present the outward appearance at least of deciding the cases without reference to the innumerable unstated factors involved. *Samson* v. *Samson* [1] is one such case. We learn from the reports that after Mrs. Samson had been deserted by her husband she obtained a maintenance order against him and went back to live with her mother and father. For good measure, she took with her their child and a large number of the gifts they had received on their marriage less than two years before. Her husband had already taken with him the rest of the presents and was holding the balance of the cash gifts in his bank account. Mrs. Samson brought an action to sort out the ownership of the various items. The Registrar who heard it (and who was upheld by the Court of Appeal) apportioned some of the gifts to the wife, some to the husband, and found the wife entitled to £135 of the money in the husband's bank—all on the basis that the wife was entitled only to those gifts coming from her side of the family and the husband to those from his.

[15] *Supra.*
[16] *Supra.*
[17] *Lindsay, Gracie & Co.* v. *Cusimano* (1882) 12 F. 503 (Circuit Court, Eastern District of Louisiana).
[18] *The Oluf* (1883) 19 F. 459 (Circuit Court, Eastern District of Louisiana).
[19] *Berwind-White Coal Mining Co.* v. *Solleveld, Van Der Meer and T. H. Van Hattum's Stoomvaart Maatschappij* (1926) 11 F. 2d 80.
[20] At p. 82.
[1] [1960] 1 All E.R. 653; [1960] 1 W.L.R. 190.

The matter apparently disposed of so simply in fact raises problems fundamental to the economics of family disputes. Take the compactness and comprehensiveness of the machinery for one thing. These problems of the Samson family have already been before the courts twice, once in the form of a maintenance application and once in the form of the present application to the county court. It takes little imagination to see the possibility of further conflicts, each to be decided without express reference to the others. It is by no means certain that there will be any more litigation: the Samsons may be able to solve any further problems by agreement between themselves. But it is nonetheless possible for there to be, for instance, a dispute over the occupation of the family home, a claim for increased maintenance pending the hearing of an application for separation or divorce, or an application for permanent support once the marriage has been dissolved. All are possible actions between the same two people about the same group of assets.

It would, of course, be foolish to share out all the parties' property at once. They are still married and there is no reason to believe that they propose to end the marriage. To apportion their assets between them could possibly cause resentments and jealousies which would hinder a rational adjustment of their differences at a later stage. But surely it ought still to be possible to devise some scheme for combining issues relating to the financial positions of the family members and, in one appearance before a court, make some temporary allocation of assets? To have the opportunity for litigation may be a source of satisfaction to those who can afford multiple proceedings but the proposed final extension of legal aid as far as domestic proceedings in magistrates' courts makes one think that these fortunate people are few in number. Lord Morton's Royal Commission refused in 1956 to contemplate the possibility of allowing magistrates to decide property disputes between husband and wife. If one accepts, though, that problems of granting financial maintenance, making some division of chattels and deciding who shall have the right to occupy the family home are all merely parts of the same problem, then some of the difficulties disappear. Indeed, at the moment, it is common practice for magistrates to make the size of maintenance orders variable according to whether or not the wife and children are being allowed the use of the home. It is hard to resist the suggestion that the magistrates should also have the power to *grant* them the use of such property, or to allow them to use the vacuum cleaner, tea-service and bed-linen which were wedding presents to the husband and wife. To narrow the issues as we do at the moment is rather like scything one blade of grass without looking at the length of the grass in the rest of the field.

Apart from this preliminary impression, though, the main interest in *Samson* lies in the method adopted by the Court of Appeal in dividing the assets. One starts, presumably, with the

assumption that the legal and beneficial titles to the property have always been in some person or persons. Neither can be left dangling. If someone gives property to a husband and wife, the equitable right to that property must from the beginning belong to someone, be it the husband, the wife, both jointly, or the donor himself. But once it is, say, in the husband's pocket, it does not necessarily stay there and, like the conjuror's rabbit, can mysteriously turn up in the pocket of the wife or the donor. The device used both to put it into one person's pocket and then to shift it to another is the law's finest contribution to the science of sleight of hand: "intention." In the case of the property belonging to Mr. and Mrs. Samson, for instance, the "intentions" of their wedding guests and well-wishers would determine the original destination of the individual gifts. If cousin John "intended" the silver platter to belong to husband and wife jointly, then it would.

But the courts are now very wary of believing this to be any real guide. Experience has shown that in the vast bulk of the cases positive intentions never existed at all in the minds of the donors and that the giving and acquiring were carried out without any deliberate conferring of ownership on one person or another. No doubt if the relatives and friends were asked, their replies would divide neatly according to the lines of kinship and friendship—and so even this basic inquiry (which is so vital to an acceptance of the theory of "intention" but which is so seldom in fact made) would provide answers which would be by no means infallibly true. Instead, section 17 of the Married Women's Property Act has been interpreted as giving the courts the power to impute such intentions as they think fit. Yet they have, by and large, preserved the dogma that the intentions they fix upon are then related back to the time when they should originally have existed. The Court of Appeal has met with considerable agreement when it has announced that it "cannot . . . vary [the rights of husband and wife] merely because it thinks that, in the light of subsequent events, the original agreement was unfair."[2] In fact, this only serves to increase the confusion. The "original agreement" is so seldom explicitly made that the courts must and do infer what it would have been in the light of these "subsequent events."[3] We therefore get the situation in which the courts look to the married life of the parties

[2] *Per* Romer L.J. in *Cobb* v. *Cobb* [1955] 2 All E.R. 696, 700. *Cf. Kelner* v. *Kelner* [1939] P. 411; [1939] 3 All E.R. 957; *Lee* v. *Lee* [1952] 2 Q.B. 489n., 491; [1952] 1 All E.R. 1299, 1301; *Barrow* v. *Barrow* [1946] N.Z.L.R. 438, 443; *Simpson* v. *Simpson* [1952] N.Z.L.R. 278, 284–285; *Watson* v. *Watson* [1952] N.Z.L.R. 892; *Masters* v. *Masters* [1954] N.Z.L.R. 82, 83; *Miller* v. *Miller* [1946] Q.W.N. 31; *Buchanan* v. *Buchanan* [1954] St.R.Qd. 246, 248; *Wirth* v. *Wirth* (1956) 30 A.L.J. 586 (Qd.).

[3] See, *e.g.*, *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63; [1952] 2 All E.R. 863; *Fribance* v. *Fribance* [1957] 1 All E.R. 357; *Silver* v. *Silver* [1958] 1 All E.R. 523; *Peychers* v. *Peychers* [1955] N.Z.L.R.564; *Reeves* v. *Reeves* [1958] N.Z.L.R. 317; *Dillon* v. *Dillon* [1956] N.Z.L.R. 162; *Mitchelson* v. *Mitchelson* (1953) 3 W.W.R.(N.S.) 316 (Man.); *Sopow* v. *Sopow* (1958) 24 W.W.R.(N.S.) 625 (B.C.).

to see what intentions they should impute and then say that they cannot alter these intentions to fit the facts of the married life. By saying that there are cases in which " property which is given at the time of the wedding to one spouse or the other may become joint property by the subsequent conduct of the parties," [4] the court in *Samson* only muddies the water a little more. It assumes that it can decide upon the original beneficial ownership by reference to some criterion other than the later behaviour of the parties —a proposition which in practice is not entirely free from doubt.

We are left, therefore, with the problem of the attitudes of the judges in deciding precisely what intentions to impute. An older judge may find it hard to impute the intention that husband and wife should enjoy their property equally, since this democracy has never been in such vogue among young people as it is today.[5] On the other hand, a judge who feels that husband and wife have never troubled to draw artificial lines of ownership between their various items of property and who is himself conscious of trends in attitudes,[6] may more easily incline towards imputing an intention to benefit the parties jointly. As F. B. Adams J. put it in New Zealand in 1955:

> " Is the court to attribute to the wife in 1921 an intention that the husband might be so meanly treated as the outcome of their future married life, [*i.e.*, that he would be left penniless] and to attribute to the husband so complete an abandonment of all beneficial interest in the property which was to represent his life's savings? Or is the court to attribute to them both an intention more in accord with common sense and fair dealings between them? " [7]

[4] [1960] 1 All E.R. at 656.

[5] This is rather an inadequate way of describing the tremendous developments in the position of women in the last 150 years. Mr. McGregor's penetrating bibliographical note, " The Social Position of Women in England, 1850–1914," 6 B.J.Soc. 48 (1955), fills in many of the details for the vital sixty years before the 1914–18 War and later statistics tell an intriguing story of the modern wage-earning woman. In 1957, 35·1 per cent. of all employed people were women (*Min. of Labour Gazette*, 1958, 44–45), representing 30·6 of the total female population (*Annual Abstract of Statistics*, 1958, 7 and 105). Professor Titmuss has estimated that the lives of some four million families in Britain are now affected by the paid employment of the wife or mother out of the home (*Essays on the Welfare State*, 102–103 (1958)). There is, however, no statistical indication of the extent to which wives are assuming joint responsibility with their husbands in the purchase of their homes and household effects. Personal observation is the only guide.

[6] For example, it is usually estimated that egalitarian ideals and practices are more commonly found among the lower income groups. At times when this classification was very easy to make (see, *e.g.*, 3 Holdsworth, *History of English Law* (3rd ed., 1923), 521–525; 2 Pollock & Maitland, *History of English Law* (2nd ed., 1923), 399–436; Notestein, " The English Woman, 1580–1670," in *Studies in Social History* (ed. Plumb), 69 (1955)), there was certainly more jointly owned property than the law would indicate and it is undoubtedly true that it was the development of a middle income group which stimulated both legal change in the nineteenth century and the extension of these ideals throughout the community (see, *e.g.*, Dicey, *Law and Public Opinion in England in the Nineteenth Century* (2nd ed., 1914), 385–386; Lewis & Maude, *The English Middle Classes*, Chap. 2 and *passim* (1949)).

[7] *Peychers* v. *Peychers* [1955] N.Z.L.R. at 570.

Again, the judge who looks forward to the consequences of his decisions may prefer to provide for the future of a sick and penniless wife and her family by inferring that she was *always* intended to take the fullest benefit from the property put in her name.[8] Or, so as not to impede partition of property which he knows to be imminent, he may choose to impute the intention of holding by a tenancy in common instead of by a joint tenancy.[9]

In the case of a couple who have not been married very long, it may well be possible to say that there is neither a "joint venture" on their part (as evidenced by the joint use of their property [10]), nor sufficient economic need on the part of either to justify an equal division of assets.[11] It is just as possible, though, to urge that modern conditions are such that the husband and wife could easily have had this very intention of sharing the benefits of their property equally. In the abstract, one approach is no more likely or fair than the other. In the abstract, it is not offensive if Hodson, Willmer and Devlin L.JJ. say that:

> "where no intention is clear the court is fully entitled to draw the inference . . . that money and gifts in kind originating from one side of the family were intended for the husband and those from the other side, from friends of that party, were intended for the wife." [12]

An expression of opinion to this effect by Lord Goddard in *Hichens* v. *Hichens* [13] and a "common-sense" decision by Judge Cave [14] provided the necessary justification.

Thinking in terms of the functions of family property law, it is true that it is not going to be much help to limit the courts by principles of equal division or proportional division. There must be power to divide assets equally between husband and wife and power to divide unequally. But the exercise of the power in the individual case must follow some pattern. The judge may be able

[8] *e.g.*, *Silver* v. *Silver*, *supra*, note 3; *Richards* v. *Richards* [1958] 3 All E.R. 513.
[9] *Peychers* v. *Peychers*, *Reeves* v. *Reeves*, *supra*.
[10] It is obviously difficult to decide precisely when a "joint venture" starts. In *Samson*, for instance, the cash gifts had been paid into the husband's bank account but, after the marriage, the wife had been given the right to draw upon it. A joint venture? £135 had been paid for the expenses of the honeymoon. A joint venture? £725 had been paid as a premium for the assignment of the tenancy of the flat which was the couple's home. A joint venture?
[11] This was the line taken in *Sutherland* v. *Sutherland* [1955] N.Z.L.R. 689. The parties had separated after being married for five years. Turner J. dismissed the wife's application for the sale and division of the proceeds of the family home. Although she had contributed only one-eighth of the purchase price, she claimed to be entitled to one-half of the proceeds. The judge indicated that after "a substantial period" of married life, he might lean towards dividing the assets equally but felt that at the moment the wife should be entitled to no more than one-eighth of the proceeds. One wonders about the effect on family stability of a direction to go and live together for a few more years, on the understanding that the wife will then be in a better economic position to leave her husband.
[12] [1960] 1 All E.R. 656 E.
[13] [1945] P. at 26; [1945] 1 All E.R. at 453.
[14] June 14, 1945, referred to in 95 L.J. 222.

to decide "as he thinks fit" under section 17—but this does not mean that some solutions are not "fitter" than others. For myself, I assume that any decision which considers and balances the general equality of husband and wife and the existence and degree of economic need to be met will be "fitter" than one which does not. Merely to give the husband the gifts from his side of the family and the wife the gifts from hers smacks very much of the unrealistic proportional division of assets made in *Re Rogers' Question* [15] and *Sutherland* v. *Sutherland*.[16] It leans towards disposing of the application quickly and easily without much thought for the consequences. As it now stands, whether or not Mrs. Samson's needs are met by the allocation to her of £135 and a few pieces of silver-plate will depend on her surrounding financial circumstances. She may be rich and be able to care for her child; she may be so poor that neither £135 nor silver-plate can adequately meet her immediate and long-term needs. She has a maintenance order, that much we know—but we do not know how much it is for. The maximum is not over-generous. If the court's state of knowledge is no fuller than ours, is this not simply another case of cutting a blade of grass and not paying attention to the rest of the field?

Alan Milner.

Standard Term Fails

The Court of Appeal case of *Lowe* v. *Lombank, Ltd.*[1] was a welcome defeat of an ingenious attempt to evade a strict provision of the Hire-Purchase Act, 1938, enacted to protect inexperienced members of the public. The plaintiff had bought a secondhand motor-car from a dealer, who arranged for hire-purchase facilities with the defendants. The dealer had described the car to the plaintiff as "perfect, or nearly so," but it soon broke down and was found unroadworthy. The plaintiff's action for damages was successful.

The agreement which the plaintiff was asked to sign contained this clause: "The hirer further acknowledges and agrees that he has not made known to the owners expressly or by implication the particular purpose for which the goods are required, and that the goods are reasonably fit for the purpose for which they are in fact required." This clause was, of course, drafted in the hope of escaping from the rigour of section 8 (2), Hire-Purchase Act, which provides that "where the hirer expressly or by implication makes known the particular purpose for which the goods are required, there shall be an implied condition that the goods are reasonably fit for such purpose."

The hope placed in the clause was dashed in this case. The

[15] [1948] 1 All E.R. 328.
[16] *Supra.*
[1] [1960] 1 W.L.R. 196; [1960] 1 All E.R. 611.

buyer's particular purpose when acquiring a motor-car, it was said, was to use it as a means of transport. Generally speaking, it is impossible in the nature of things for the seller of a motor-car to say that the particular purpose of the buyer was not made known to him by implication. To meet this difficulty the above clause was inserted in the contract, but the court held that although couched in the terms of a contractual promise the words were simply a statement by the hirer that he had not done something in the past; in a proper case that could give rise to an estoppel, but it was certainly no promise. It is doubtful whether this argument was necessary at all, in view of section 8 (3), to be considered presently.

One wonders what would have been the result if the buyer had not been a housewife who wanted the car to ease her shopping expeditions, but a young man keen on rallies and endurance tests, and if the car had been roadworthy but unfit for the special requirements of the buyer. In such circumstances the particular purpose of the purchase would not have been obvious to the seller, and the exemption clause might be of some assistance to the seller.

Not of course of great assistance, for in one important respect the Act goes beyond the requirements of the common law. A long line of cases has established that a term in a standard contract must be brought home to the other party, but section 8 (3) of the 1938 Act provides that in hire-purchase agreements to which the Act applies an exemption clause must be "brought to the notice of the hirer and its effect made clear to him." In a case of the kind contemplated in the preceding paragraph the seller would have to draw the young man's attention to the clause and make clear its effect. But neither are salesmen necessarily articulate teachers of law nor "never-never" buyers receptive students, so that the burden of proof necessary to satisfy the court that the effect of the exemption clause has been made clear will be very difficult to discharge.

This is actually borne out by another feature of this case, confirming that business men may be blissfully ignorant of the law relating to their everyday business. On receiving the plaintiff's complaint about the unroadworthiness of the car the defendants replied that they were not concerned with the quality of the goods; they were acting purely as bankers! The court preferred to think that this statement was ignorant rather than dishonest.

O. C. Giles.

"Omne Ignotum Pro Magnifico?"

Beale, in his *Treatise on the Conflict of Laws*, states: "If the law of the forum does not provide a form of action appropriate for the enforcement of the foreign right the action may not be maintained."[1] Wolff, commenting on this statement, remarks: "The

[1] (1935), Vol. 3, p. 1631, § 608.1.

same seems to be true for English law, though 'forms of action' belong to the past. English courts in distinguishing between 'rights' and 'remedies' do not invent new remedies in order to entertain an action based on a foreign right." [2]

In the light of the above, the recent decision of Lord Parker C.J. in *Phrantzes* v. *Argenti* [3] should command considerable interest. The plaintiff in this action was a Greek lady resident in England, where she had recently married; the defendant was her father, who was also a Greek national resident in England; the plaintiff claimed a declaration that, according to the law of Greece, she was entitled to be provided by her father with a dowry; an account of his property; an inquiry as to the amount of dowry properly payable and such further inquiry, judgment or order as might be required to give effect to the declaration sought. The plaintiff alleged that her father was at all material times domiciled in Greece and that her rights in respect of his property arising from the relationship were governed by Greek Law.[4] The defendant, *inter alia*, denied that he was domiciled in Greece and objected that the statement of claim disclosed no cause of action. Eventually, the master ordered the trial of the preliminary issue whether, assuming the father to be domiciled in Greece, his daughter was entitled to the relief sought.

A scholarly exposition of the Greek law as to dowries is to be found in the judgment of the learned Lord Chief Justice.[5] Suffice it to say here that a father must constitute on behalf of a daughter entering on marriage a dowry in accordance with his fortune, the number of his children and his own social position in the community in which he lives, and in accordance with the social position of his son-in-law—subject to certain exceptions (such as whether the daughter had committed a fault disentitling her to a dowry), none of which applied in the instant case. The dowry is defined as the property *granted to the husband* either by the wife, if she be possessed of sufficient fortune, or by the parent on the wife's behalf, so as to "lighten the burdens of matrimony." It is constituted by a contract entered into, in a case such as this, between the father and the husband; this contract must be entered into by notarial deed. The dowry may consist of present or future property (which must be specified), and may be movable or immovable. Movables become the husband's property save where the dowry contract provides otherwise. The court often has to decide what, in the circumstances, the dowry is to consist of, *e.g.*, how much shall be immovables, how much movables; whether any part of it is to consist of the usufruct from property and for how long; whether a

[2] *Private International Law* (2nd ed., 1950), p. 178.
[3] [1960] 2 W.L.R. 521; [1960] 1 All E.R. 778.
[4] As Wolff, *op. cit.*, states at p. 390: 'It is [the law of the father's domicile] which will say . . . whether a daughter is legally entitled on her marriage to a dowry, a trousseau, or the like from her parents."
[5] [1960] 2 W.L.R. at pp. 524–525, 528–529.

rent-free house is to be provided; what are to be the terms as to ownership of the dowry. In the event of failure by a father to provide a dowry, his daughter—not, it will be observed, her husband—can sue in the Greek courts to obtain an order condemning her father to conclude a dowry contract with her husband. Where a father of Greek nationality is, as in the present case, absent from Greece, he may be condemned to enter into the contract before the Greek consul or a foreign notary public. In proceedings such as these, the Greek courts will decide what, in all the circumstances, is the appropriate amount of the dowry and may in addition specify the assets to be handed over. A son-in-law is at liberty to intervene in such suits if he wishes. A dowry is not constituted unless and until the father enters into the contract as ordered. The only sanctions available to a daughter of a father refusing to enter into a contract so ordered are to secure his imprisonment or to sue him for damages.[6]

Lord Parker C.J. thought that, assuming the defendant to be domiciled in Greece and accepting that by reason of the parties' relationship there arose either upon the daughter's birth or on her marriage an obligation under Greek law on the father to provide a dowry, "it must be . . . conceded that whether or not the father's obligation to constitute a dowry and the reciprocal right of the daughter to have one constituted on her behalf can be enforced in [England], the obligation and the right are of such a nature as [English] courts will recognise."[7] His lordship then proceeded to deal with the defence that, even if what the plaintiff sought to enforce was a proprietary right (which was denied) it could not be enforced unless it came within some definite pre-existing rule—*i.e.*, that an English court cannot be asked to enforce rights which it has never before enforced, such as the duty imposed by a foreign legal system on a parent to maintain his child or vice versa.[8] His lordship proceeded to consider at some length *Re Macartney*[9]

[6] It must, in fairness, be pointed out that the master—after the date of his original order—gave the defendant leave to deliver the further defence that, since the issue of the writ, he had provided for the plaintiff under a deed made under the laws of Liechtenstein and that this provision sufficed according to Greek law to discharge his dotal obligations. Despite this, the master allowed the terms of the preliminary issue to stand. The Lord Chief Justice thus ruled that he would only deal with the issue as ordered arising under the original pleadings.

[7] [1960] 2 W.L.R. at p. 526.

[8] [1960] 2 W.L.R. at p. 526, citing Dicey, *Conflict of Laws* (7th ed., 1958), p. 403, which refers to *Coldingham Parish Council* v. *Smith* [1918] 2 K.B. 90.

[9] [1921] 1 Ch. 522. In this case it was sought to enforce in England an order made by a competent Maltese court requiring the payment out of the deceased's estate of a yearly allowance in perpetuity for the maintenance of his posthumous illegitimate child by his fiancée. The deceased had died domiciled in England and his assets had been lodged in the English court. Astbury J. refused to enforce the foreign judgment *in personam* because (1) "recognition [was] contrary to public policy, because the general recognition of the permanent rights of illegitimate children and their spinster mothers as recognised in Malta [was] contrary to the established policy of this country, especially having regard to the fact that the child's interest was not confined to minority" (at

and the American case which Astbury J. followed therein, *De Brimont* v. *Penniman*,[10] and distinguished them on the grounds (a) that there was no question of the Greek law being designed against pauperism, and (b) that the Greek law was intended to operate extraterritorially. He added that "if this were the only point in the case I would hold that this was a right which could be enforced [in England]"[11] and found as his warrant for so saying the famous and forward-looking judgment of Cardozo J. in *Loucks* v. *Standard Oil Co. of New York*.[12] The right under Greek law was, he thought, a right *in personam*, but, whatever label was accorded to it, it could be enforced in England "if it was a right to payment of a fixed sum of money or a definite proportion of the father's fortune simpliciter."[13] It was at this point, as the learned judge pointed out, that the plaintiff's difficulties began: her right was *not* one to the payment of a sum of money but merely a right to a court order requiring the father to cause a notary to draw up a contract in conformity with the court's directions and to enter into that contract with the son-in-law, who, as has been seen, need not necessarily be a party to the suit. And further, the Greek court has any number of matters to consider in fixing the amount, composition, and method and length of enjoyment, etc., of the dowry—as has also been shown above. Hence "All these inquiries and decisions are essentially matters for the domestic courts, and matters largely for the discretion of [the Greek] courts and not our courts," and "it would be quite wrong for our

p. 527); (2) that the claim was founded on a cause of action not recognisable in England so that, owing to its novelty to an English court, enforcement must be refused; (3) that the Maltese judgment was not final and conclusive in the particular circumstances of the case.

This case, and the one under review, may be profitably compared with *Burchell* v. *Burchell* [1926] 2 D.L.R. 595 and *Mayo-Perrott* v. *Mayo-Perrott* [1958] I.R. 336; Webb (1959) 8 I.C.L.Q. 744.

[10] (1873) 10 Blatchford's Circuit Reports 436. A French citizen had married in France the daughter of two U.S. citizens. The daughter died leaving a child. According to French law the daughter's parents were bound to make an allowance to the father for this child's support. The father obtained the judgment of a French court against them when they were present in France, awarding him an annual allowance. On their return to America he sued them there for arrears. Woodruff J. refused to entertain the action, holding that the French law and the decree made thereunder were only local in nature and in operation, and, being simply designed to guard against pauperism, could not have any extraterritorial significance.

The learned Lord Chief Justice nowhere expressly mentions that the above two cases were concerned with *the enforcement in England and America of a foreign judgment* based on a foreign law and not, as here, with an attempt *originally to enforce in England a foreign legal right having no direct analogy to any known English cause of action. Cf.*, however, *Batthyany* v. *Walford* (1887) 36 Ch.D. 269 (C.A.).

[11] [1960] 2 W.L.R. at p. 528. This impliedly accepts the criticism of Wolff, *op. cit.*, pp. 266–267 (to which he had referred (at p. 527)), of *Re Macartney*—that "it would seem possible to escape the unsound suggestion that recognition of a foreign judgment may be refused merely on the ground that the cause of action is unknown to English law." See, further, Dicey, *op. cit.*, p. 1002 *et seq.*, and *cf.* the 6th ed. (1949), Rule 85, Exception 1, pp. 408–409.

[12] (1918) 224 N.Y. 99 at 110, 111.

[13] [1960] 2 W.L.R. at p. 528.

courts to claim jurisdiction in the matter." [14] His lordship concluded that the daughter could not claim the relief she sought because English law as the *lex fori* gave no cause of action and no relief appropriate to the enforcement of her right to obtain an order to condemn her father to enter into a dowry contract in due form with his son-in-law, who was not a party to the suit. "It is true," he continued, "that a plaintiff seeking to enforce a foreign right here can demand only those remedies recognised by English law, and that the claim will not be defeated merely because those remedies are greater or less than those in the courts of the foreign country. . . ." [15] Accepting Cheshire's statement that "It is obvious that a plaintiff who seeks to enforce a foreign claim in England can demand only those remedies recognised by English law, and cannot demand even them unless they harmonise with the right according to its nature and extent as fixed by the foreign law," [16] he considered that if the machinery by way of remedies in England were so different to that in Greece as to make the right sought to be enforced in England a different right, the right was not to be enforceable in England.[17] Hence, even if the court did grant a declaration and did embark on the requisite inquiry as to the extent of the dowry, the best it could do would be to order payment to the plaintiff of the amount found to be appropriate—which would amount to enforcing a right which the plaintiff had not got under the law of Greece. Indeed, there was no power in the court, inherent or other, which could enable the court to give relief consistent with Greek law.

The plaintiff thus lost because "One of the eternal verities of every system of private international law is that a distinction must be made between substance and procedure, between right and remedy." [18] English law possessed nothing in her armoury to help the plaintiff to her rights—even the action for a declaration failed her, despite the hopefulness with which such an action has been acclaimed since *Barnard* v. *National Dock Labour Board*.[19] It would seem that the plaintiff's only course, in the light of the

[14] [1960] 2 W.L.R. at p. 529, relying on the distinction drawn in *Kornatzki* v. *Oppenheimer* [1937] 4 All E.R. 133 by Farwell J. between an evaluation to be based on a question of fact—which an English court applying foreign law would be competent to make—and one into which elements of discretion entered—which an English court applying foreign law would have no jurisdiction to make.

[15] [1960] 2 W.L.R. at p. 529, citing Dicey, *op. cit.*, p. 1089, and *Baschet* v. *London Illustrated Standard* [1900] 1 Ch. 73.

[16] *Private International Law* (5th ed., 1957), pp. 667–668, citing *Slater* v. *Mexican Nat. Ry. Co.* (1904) 194 U.S. 120.

[17] [1960] 2 W.L.R. at p. 530, citing also the *Restatement on Conflict of Laws* (1934), para. 608 and *Comment* (*a*), part of which reads: "A court will not invent a new form of action, unknown to the law of the forum, in order to give a remedy on a foreign cause of action," and the statement of Beale with which this note opens and *Weidman* v. *Weidman* (1931) 174 N.E. 206; 274 Mass. 118 and *Howard Undertaking Co.* v. *Fidelity Life Assn.* (1933) 59 S.W. (2d) 746 (both of which are cited by Beale, *loc. cit.*).

[18] *Cheshire*, *op. cit.*, p. 649.

[19] [1953] 2 Q.B. 18 (C.A.).

impeccable reasoning of Lord Parker C.J., is to sue her father for damages in a Greek court of competent jurisdiction, hope to be awarded a final judgment for a sum certain in money and to enforce that judgment in England. There seems to be every prospect that she could now prevail over any defence in the enforcement action that English law knows of no such action for damages.

P. R. H. Webb.

The Effect of an Illegal Contract

The decision of the Privy Council in *Singh* v. *Ali*[1] is of some importance. This is not the first case in which a court has said that property in goods passes to the buyer under an illegal contract of sale, but it is the first time that the contrary has been argued before the court.[2]

Regulations dating from 1945 provided that no person should "sell, . . . part with the possession of, purchase, . . . or take possession of any motor vehicle without a permit in writing," and that no person should use a goods vehicle, or permit it to be used, without a haulage permit issued to the user. S. owned a lorry and obtained a haulage permit in his own name. He sold the lorry to A. without obtaining a permit authorising the sale. As A. could not obtain a haulage permit the lorry was registered and operated in S.'s name, in breach of the express conditions in S.'s haulage permit. As Lord Denning said: "All this method of operation was quite illegal. . . . The two of them were fellow conspirators engaged in practising a deceit on the public administration of the country."

Some years later S. and A. fell out. A.'s solicitors applied for the issue of a fresh haulage permit in A.'s name. Thereupon S. seized the lorry whilst A. was away from home. A., who had meanwhile failed to secure a haulage permit, sued S. in detinue, claiming the return of the vehicle or its value. A. succeeded in the Malayan Court of Appeal, and the decision awarding A. damages representing the value of the lorry was affirmed by the Judicial Committee.[3]

In Lord Denning's words:

> "In order to succeed in detinue, it was essential for [A.] to show that he had the right to immediate possession of the lorry

[1] [1960] 1 W.L.R. 180; [1960] 1 All E.R. 269; *sub nom. Sajan Singh* v. *Sandara Ali*. The Board comprised Lords Cohen, Denning and Jenkins.

[2] Of the four cases referred to in the Board's advice to the Head of the Federation of Malaya, two are relevant on this point: *Scarfe* v. *Morgan* (1838) 4 M. & W. 270 (Ct. of Ex.) and *Bowmakers, Ltd.* v. *Barnet Instruments, Ltd.* [1945] K.B. 65 (C.A.). In neither was the point argued (see 4 M. & W. at p. 274; [1945] K.B. at p. 70).

[3] An alternative claim for a declaration that A was the owner of the vehicle could not succeed because A could not show that there was a haulage permit authorising him to use the vehicle ([1960] 1 All E.R. at p. 272). Apparently this was because A asked for a declaration that he was the owner of an *authorised* vehicle (*ibid.* p. 272).

> at the time of commencing the action, arising out of an absolute or special property in it. . . . And . . . their Lordships think he succeeded. Although the transaction between [A.] and [S.] was illegal, nevertheless it was fully executed and carried out; and on that account it was effective to pass the property in the lorry to [A.]. . . . The reason is because the transferor, having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the means by which he did it—he cannot throw over the transfer. And the transferee, having got the property, can assert his title to it against all the world, not because he has any merit of his own, but because there is no one who can assert a better title to it." [4]

It will be noted that the reason given is a justification, but not an explanation. It assumes that, somehow or other, the property has passed: "the transferor, having *fully achieved* his unworthy end, . . . cannot throw over *the transfer*. And the transferee, *having got the property*, can assert *his title* to it . . ." [5] The explanation is, perhaps, that the property in the goods passes to the buyer in the ordinary way by virtue of the contract of sale between the parties.[6] Thus it is not true to describe contracts involving the commission of a criminal offence as "totally ineffective," or to say that they are "completely devoid of legal effect" or that they "receive no recognition . . . by the courts." [7] It is, of course, true to say that they will not be *enforced* by the courts at the suit of a party concerned in the illegality; but this is some way short of saying that they are destitute of all legal effect.

The distinction between executory and executed contracts, indicated by Parke B.[8] and adopted in *Singh* v. *Ali*, lies not in the *effect* of the contract but rather in the need for enforcing the one and not the other. It is, for example, submitted that if, on the facts of the instant case, S. had sold the lorry to A., but A. had failed to pay, S. could not sue A. to recover the lorry by relying on his property rights independent of the illegal contract[9]: nor, of course, could S. sue if, by the express terms of the contract, no

[4] *Cf.* Brandeis J.: "Courts grant relief against present wrongs and to enforce an existing right, although the property involved was acquired by some past illegal act": *Loughran* v. *Loughran* (1934) 292 U.S. 216, 228. Holmes J.: "A person does not become an outlaw and lose all rights by doing an illegal act": *National Bank & Loan Co. of Watertown* v. *Petrie* (1903) 189 U.S. 423, 425.

[5] Italics added.

[6] Sale of Goods Act, 1893, ss. 17 and 18. Where the contract is for specific goods, the property passes when the parties so intend: *ibid.* s. 17.

[7] Cheshire and Fifoot, *The Law of Contract*, 4th ed., pp. 275, 272 and 273 respectively. This note was written before the appearance of Cheshire and Fifoot's 5th ed.; see now their modified views, 5th ed., pp. 273, 274, 275.

[8] *Scarfe* v. *Morgan* (1838) 4 M. & W. 270 at p. 281. *Cf. Williams* v. *Paul* (1830) 6 Bing. 653, explained by Parke B. in *Simpson* v. *Nicholls* (1838) 3 M. & W. 240, 244.

[9] *Cf. Bowmakers, Ltd.* v. *Barnet Instruments, Ltd.* [1945] K.B. at p. 71. That principle may well be limited to cases where the defendant obtains possession as a bailee. *Cf. Restatement of the Law of Torts*, § 889. A further limitation is suggested in *Anson on Contract*, 21st ed., at p. 325.

property passed to A., as in a conditional sale contract.[10] In these cases S. would be indirectly attempting to enforce the contract against A.

An alternative explanation of the passing of the property is that property in goods may pass, without any contract of sale, by delivery of possession with the intention of passing the property in the goods.[11] Although in the instant case there was delivery of possession, was there any intention to pass the property by delivery? Presumably in such a case the seller's intention is to pass the property on the assumption that a contract of sale exists. If there is no contract, how can he be said to have any intention of parting with the property? The point might perhaps become important if the goods are delivered before payment. In *Stocks* v. *Wilson*[12] an infant obtained goods under a contract said to be "absolutely void" by the Infants Relief Act, 1874, and Lush J. said *obiter* that, despite the Act, "the property passed by the delivery."[13] Perhaps the answer is that, if the seller intended to pass the property at the time of delivery, that intention is not vitiated by a mistaken appreciation of the validity of the contract.[14]

Whatever may be the true explanation, *Singh* v. *Ali* suggests that the division of illegal contracts into two classes by Dr. Cheshire and Mr. Fifoot[15] is an over-simplification. Illegal contracts cannot simply be classified as "totally ineffective," or not, according to the nature of the illegality. Rather might one say, with Corbin:

> "There are many varieties and degrees of 'illegality.' These varieties and degrees must be taken into account in determining the juristic effect of a transaction that involves some form of illegality. . . . Before granting or refusing a remedy, the courts have always considered the degree of the offence, the extent of public harm that may be involved, and the moral quality of the conduct of the parties in the light of the prevailing mores and standards of the community."[16]

There may be room for argument whether English courts have "always considered" these factors, but the type of illegality

[10] *Albertson & Co.* v. *Shenton* (1916) 78 N.H. 216; *Corbin on Contracts*, § 1533, pp. 1052–1053. The point is open in English law.

[11] *Cochrane* v. *Moore* (1890) 25 Q.B.D. 57 (C.A.).

[12] [1913] 2 K.B. 235 (K.B.D.).

[13] [1913] 2 K.B. at p. 246. See the criticism by Cheshire and Fifoot, *cp. cit.*, 5th ed., pp. 343–344.

[14] Even if, as in *Stocks* v. *Wilson*, this is the result of the other party's fraud. *Cf.* the approach to the owner's *consent* to the possession of goods by a mercantile agent under the Factors Act, 1889; to adapt the words of Somervell L.J. in *Pearson* v. *Rose & Young, Ltd.* [1951] 1 K.B. 275, at pp. 283–284: "The matter can be thus tested: if, immediately after the seller had delivered the goods, he had been asked: 'did you mean to pass the property to the buyer?' he would have answered 'Yes.'"

[15] *Op. cit.*, 4th ed., pp. 273–274; *cf.* now 5th ed., pp. 275–276; *Bennett* v. *Bennett* [1952] 1 K.B. 249 (C.A.); *Goodinson* v. *Goodinson* [1954] 2 Q.B. 118 (C.A.).

[16] *Contracts*, § 1534, pp. 1055–1056.

involved in *Bowmakers, Ltd.* v. *Barnet Instruments, Ltd.*[17] and *Singh* v. *Ali* leads one to think that not all contracts involving criminal offences can be grouped together as "totally ineffective." In a word, there are crimes and crimes.[18]

Aubrey L. Diamond.

Two Problems in Damages

Although no fundamental question of principle was involved, the judgment of Buckley J. in *Diamond* v. *Campbell-Jones*[1] contains an interesting discussion of two problems in the law of damages. The defendants had agreed to sell a leasehold house in Mayfair to the plaintiff for £6,000. By a judgment dated April 24, 1958, Harman J. declared that the defendants had wrongfully repudiated the contract and ordered an inquiry as to damages. By agreement the parties brought the inquiry before Buckley J. in court.[2] Normally one would not expect such an inquiry to present any theoretical problem but here the incidence of planning and taxation, two factors seldom far-distant in modern life, served to complicate the issue.

The house was held on a lease expiring in 2003 and was sold subject to a contract between the vendors and the reversioners for the grant of a new lease,[3] and also on condition that the permitted use for planning purposes was that set out in a letter from the Minister of Housing and Local Government to the vendors' solicitors, dated February 15, 1954. This letter granted permission for the ground floor of the house to be used as offices until December 31, 1970, provided the windows were curtained and not used for display. Permission was refused for the remaining four floors and basement to be used as offices but the letter gave a clear indication that an application to use the remainder of the house for "multiple residential use"[4] would be very likely to succeed.[5] It was common ground that the reversioners would be willing in return for an increase in rent, to accede to a modification of the covenant in the lease, which required the property to be used as a single private dwelling-house so as to permit multiple use.

The plaintiff had carried on business as a dealer in real estate for a number of years and during that time had converted a number of

[17] Maximum price and industrial control orders.

[18] *Cf.* now Cheshire and Fifoot, *op. cit.*, 5th ed., p. 278.

[1] [1960] 2 W.L.R. 568; [1960] 1 All E.R. 583

[2] Such an inquiry would, of course, normally take place in chambers. See the remarks of Buckley J. at [1960] 2 W.L.R. 574; [1960] 1 All E.R. 585.

[3] This agreement was held by Harman J. to be unenforceable and Buckley J. thought it was only relevant as showing what was in the contemplation of the parties at the time of the contract.

[4] *i.e.*, to convert the house into maisonettes or flats.

[5] The headnote in the *Weekly Law Reports* is inaccurate in so far as it suggests that the Minister had actually granted such permission in his letter of February 15, 1954.

houses in central London. He contended that his purpose in buying the house was to subdivide and convert it into ground floor offices and maisonettes or flats and that the defendants were aware of this intention. Accordingly he claimed that he was entitled to damages calculated on the difference between the contract price and the value of the premises in such converted form, less the cost of carrying out the conversion. The defendants argued that the proper measure of damages was the difference between the contract price and the market value at the date of breach. On any view the damages were considerable since the market value at that date was found to be £14,500.

Buckley J. found that the defendants had no actual knowledge of the plaintiff's intention to convert and indeed that the plaintiff had not definitely decided to convert but would have been willing to dispose of the whole premises without conversion if he could have found a satisfactory purchaser such as a foreign embassy or an American television company.[6] The decision accordingly turned on what knowledge could be imputed to the defendants and on this point the arguments appeared nicely balanced. In the case of sale of goods it is well established that the normally foreseeable result of a breach of contract is that the purchaser will have to buy equivalent goods in the market and that accordingly the prima facie measure of damage is the difference between the contract price and the market value. Apart from the rule in *Bain* v. *Fothergill*,[7] which was inapplicable here, a contract of sale of land would appear to be governed by similar considerations. On the other hand the plaintiff could argue with some plausibility that it is now common knowledge that large houses can be profitably modified for multiple use where planning permission can be obtained.[8]

Buckley J., after citing the well-known passages from *Hadley* v. *Baxendale*[9] and *Victoria Laundry (Windsor), Ltd.* v. *Newman Industries, Ltd.*,[10] held that since the defendants had no actual knowledge of the plaintiff's intention it was not possible to impute such knowledge to them even from the fact that the house was ripe for conversion and even though this was widely recognised. It might appear that this ignores the fact that planning possibilities affect the value of property but if the appropriate principles are correctly applied it will be seen that this is not so. The plaintiff would have made a special profit, if he had carried out the development himself, over and above the profit which he could have made by reselling the land to someone else who might carry out the development. It would not be proper to cast the loss of this extra profit upon the defendant without showing that the defendant was

[6] [1960] 2 W.L.R. at 573–574; [1960] 1 All E.R. 587–588.
[7] (1874) L.R. 7 H.L. 158.
[8] [1960] 2 W.L.R. at 578; [1960] 1 All E.R. at 590.
[9] (1854) 9 Exch. 341 at 354.
[10] [1949] 2 K.B. 528; [1949] 1 All E.R. 997.

actually aware of the plaintiff's plans. The proper place in which to take account of the possible use of the premises other than for private residence is the computation of the market value of the premises which must, if realistically assessed, take some account of the potential uses to which the property can be put. Unfortunately the reasoning by which Buckley J. arrived at the figure of £14,500 as the market value is not reported but since the plaintiff himself only assessed the value for conversion in his own hands as £15,000 or as £17,250 for sale to an American television company [11] it seems clear that account must have been taken of this factor.

Buckley J. had less difficulty in disposing of another question. The defendants contended that the amount of damages awarded to the plaintiff should be reduced in accordance with the decision in *British Transport Commission* v. *Gourley* [12] to the net profit which the plaintiff would have retained after paying tax. *Gourley's* case must rank amongst the most important recent decisions of the House of Lords on both practical and theoretical grounds. As is well known, it laid down that in assessing the damages to be paid for personal injuries account must be taken in compensating for loss of income of the fact that tax would have been payable on that income in the hands of the plaintiff. The principle thus established has also been applied to compensation for loss of profits arising from the exercise of statutory powers,[13] and to damages for wrongful dismissal.[14] It has also given rise to an interesting and unsolved dispute between Willmer J. and Pilcher J. as to whether a salvage award should be increased in amount because tax would be payable upon it.[15] The principle thus adumbrated has been accepted by some writers as logical but conducive to practical difficulties and even to ludicrous results.[16] Mr. Jolowicz,[17] however, has contended that the decision conceals an ambivalent attitude by the courts as to whether they are providing compensation for loss of income or for loss of a capital asset and Sir Patrick Devlin has said extra-judicially "it was a thoroughly bad and illogical decision." [18] However, since the Law Reform Committee [19] has failed to agree on the desirability of any change in the law it is important to examine its precise limits. Buckley J. had no difficulty in deciding that *Gourley's* case did not apply to the present situation since the damages which the plaintiff recovered would be liable to tax as part

[11] [1960] 2 W.L.R. at 573; [1960] 1 All E.R. at 588.
[12] [1956] A.C. 185; [1955] 3 All E.R. 796.
[13] *West Suffolk County Council* v. *Rought* [1957] A.C. 403; [1956] 3 All E.R. 216.
[14] *Beach* v. *Reed Corrugated Cases* [1956] 1 W.L.R. 807; [1956] 2 All E.R. 652; *Re Houghton Main Colliery* [1956] 1 W.L.R. 1219; [1956] 3 All E.R. 300. See also *Hall* v. *Pearlberg* [1956] 1 W.L.R. 244; [1956] 1 All E.R. 297n.
[15] *The Telemachus* [1957] P. 47; [1957] 1 All E.R. 72; *The Makedonia* [1958] 1 Q.B. 365; [1958] 1 All E.R. 236.
[16] Cheshire and Fifoot, *Law of Contract*, 5th ed., 509–510. See also Baxter, 19 M.L.R. 365, and Hall, 73 L.Q.R. 212.
[17] [1959] C.L.J. 86. *Cf.* Tucker [1959] C.L.J. 185.
[18] Report of Lawyers' Convention in Israel, 1958, at 313.
[19] Cmnd. 501.

of the profits of his business.[20] This provides a useful authority for the generally accepted view [21] that in order for *Gourley's* case to be applied two conditions must be satisfied: first that the plaintiff receives an award of damages or compensation for loss of taxable income and secondly that the damages so paid are free of tax in his hands. A similar decision was arrived at in *Morahan* v. *Archer and Belfast Corporation*,[22] where Curran L.J. held that the defendants could not deliver interrogatories as to the plaintiff's tax position in a case in which the damages recovered would be taxable in the plaintiff's hands as tax liability should not be taken into account in such a case.

M. P. Furmston.

[20] *London Investment and Mortgage Co.* v. *Worthington* [1959] A.C. 199; [1958] 2 All E.R. 230; *Vaughan* v. *Parnell* (1940) 23 T.C. 505.
[21] See especially Jolowicz [1959] C.L.J. 86 at 89.
[22] [1957] N.I. 61 *Cf. Phipps* v. *Orthodox Unit Trusts* [1958] 1 Q.B. 314; [1957] 3 All E.R. 305.

REVIEWS

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION. By S. A. DE SMITH, M.A., PH.D., Reader in Public Law in the University of London. [London: Stevens & Sons, Ltd. 1959. xlvii and 486 pp. £3 10s. net.]

ENGLISH Administrative Law has been the subject of academic study for a generation, the legal profession is already becoming aware of its importance as well as its imperfections, and we are now getting monographs suitable for teachers and students. Professor de Smith is to be congratulated on the industry and analytical acumen that have gone to the writing of this book, which is as he claims "the first of its kind to have been written by an English author." It concerns that part of administrative law which is of most practical interest to the legal profession, namely, judicial review. The scope is similar to that covered comparatively by Galeotti's *Judicial Control of Public Authorities in England and in Italy*; but de Smith is much fuller, primarily analytical, secondarily historical and only incidentally comparative. He does not profess to have perfectly solved all problems of classification and arrangement. Even the title must have caused him some difficulty, for often it is not "administrative" action that the courts review but the "judicial" or (dare we say?) "quasi-judicial" action of administrative authorities. The subject-matter covers the decisions of statutory tribunals, and he may not have liked to bring tribunals under the title of "administrative authorities": on the other hand, should we call their decisions "administrative action"? We should certainly not so describe delegated legislation, which is referred to in a number of passages. Incidentally, one that we specially commend is the statement that by-laws must be "not unreasonable." This is the way we like to put it ourselves: there is a lot in the lawyer's double negative.

The introductory part makes a brave attempt to elucidate the meanings of those difficult terms, administrative, legislative and judicial; and we are persuaded to accept the conclusion that "in many cases . . . the mode of classifying statutory functions is determined by the scope of review that the courts deem to be desirable and practicable." Part II on the principles and scope of judicial review covers *vires* and jurisdiction, natural justice (*audi alteram partem*, interest and bias), and statutory restriction of judicial review. The chapter on the review of discretionary powers contains an admirable treatment of improper motive or purpose, though the terminology used in the first few pages might perhaps be reconsidered in the next edition. At page 166, for example, "powers," "discretions" and "discretionary powers" might express the same or different concepts. Are we to add "discretions" to the Hohfeldian analysis, or may we simply say that discretion is the ambit of a power?

Part III on judicial remedies describes in turn the history and scope of certiorari and prohibition, injunction, declaration and mandamus. Professor de Smith has done some pioneering work on the history (as well as the scope) of these remedies, but in a book which is rich in footnote references he perhaps does less than justice to the work of Dr. Yardley. Specially valuable is the balanced account of the action for a declaration, which some think may be destined largely to replace the prerogative orders. The historical sketch suggests that the jurisdiction to grant a declaratory judgment against administrative authorities, including the Crown, traces its origin to the Court of Exchequer rather than the Chancery. This supports our view that the declaration in public law should not be regarded as an equitable remedy.

To keep the book within bounds, Professor de Smith has excluded habeas corpus (fortunately, in view of recent decisions and pending legislation) and any full treatment of the civil liability of public authorities. Crown proceedings, which have already received a fair amount of attention from writers on constitutional and administrative law, are not dealt with separately but are woven into the general body of the text. The findings of the Franks Committee and the provisions of the Tribunals and Inquiries Act, 1958, are, of course, incorporated. Skilful use is made of revised versions of articles which the learned author has contributed in the last few years to various periodicals.

This is a very sound and useful work in the tradition of English legal textbooks. The common temptation to read too much into individual cases is avoided; for example, in that part of Chapter 12 which discusses what the courts regard as "judicial" acts for the purpose of the application of certiorari. It is both the strength and the weakness of English courts that they tend to base their decisions on the facts of a particular case or the wording of a particular statute rather than to formulate a body of general principles. Perhaps we cannot say more in commendation of the book than that we had already bought a copy on the reputation of the author before we were asked to review it; and that having studied it and used it in seminars, we are happy to keep both copies—one at home and the other at "the office." Our students specialising in administrative law find it indispensable. It may already be described as a standard textbook on the subject, and it is likely to remain so, with those improvements which the ever-industrious author will no doubt make in each succeeding edition.

Having fired this general salute, we cannot resist a parting shot. *Smith* v. *East Elloe R. D. C.* is cited in one place as an example of "a particularly strong addiction to the literal rule" on the part of the House of Lords. But surely the policy, not merely the letter, of the statute is to ensure that the *title* to land acquired by a public authority should not be rendered uncertain by being liable to be impugned after more than a short time. This is quite a different matter from the question whether *damages* should be recoverable for loss caused by an abuse of power. The fact that council houses had been built on the land before action was brought in that case emphasises the point. On the question of the cause of action for damages against the clerk to the council if he acted in bad faith, Professor de Smith suggests later that an action against the clerk might be founded on deceit or injurious falsehood. Professor Street, on the other hand, has suggested more than once elsewhere that the clerk's wrong would be abuse of process. But however great our sympathy for the plaintiff may be, we cannot see that the clerk's conduct could be brought within the definition of any of these torts. About damages there is also the problem that the plaintiff has received for the enforced sale the amount of compensation that Parliament considers adequate. It is interesting to note that in the subsequent proceedings which were actually taken against the clerk and a representative of the Ministry, the plaintiff claimed damages for conspiracy to injure (*Smith* v. *Pyewell, The Times,* April 29, 1959). Diplock J. held that there was no conspiracy; that damages had already been recovered for trespass; and anyway his lordship was not satisfied that the clerk had in fact acted in bad faith.

O. Hood Phillips.

Wills, Probate and Administration. A Manual of the Law. By B. S. Ker, m.a. (Cantab.), Solicitor of the Supreme Court. [London: Sweet & Maxwell, Ltd. 1959. xxiv and 294 pp. 42s. net.]

A new book on the law of succession has to stand comparison with such well-established favourites as Gibson's *Probate Law* (now in its sixteenth edition),

Bailey on Wills (fifth edition) and *Hughes Parry on Succession* (third edition). Tested by these standards Mr. Ker's book has much to commend it, for it is in no way a mere duplication of its rivals, being wider in scope than *Gibson* or *Bailey* and more practical in approach than *Hughes Parry*.

The blurb tells us that the book contains a practical and simple exposition of the law relating to wills, executors, probate, estate duty, administration and all the principles of equity relevant to the problems which arise on death. This is a mammoth undertaking for a book of under 300 pages, and not surprisingly Mr. Ker does not altogether fulfil his publisher's puff. Practical Mr. Ker certainly is, but he is frequently far from simple. In his preface he tells us that he writes from the viewpoint of the practitioner's office desk, and one may well wonder whether this is the best place from which to expound the basic principles of a subject to students, as distinct from communicating practice hints to articled clerks. For as so often these days the publishers seek to claim as the potential users of this book both students (presumably university students), articled clerks, solicitors, unadmitted clerks and trust officers. No one can write successfully on all these levels at once, and it smacks of sharp practice in publishers to pretend that one can.

This is not to decry the present work. For it has very considerable value for anyone engaged in the practical work of will-making, probate and the administration of estates. It is not however to be compared with *Bailey* as an introduction to the rudiments of the substantive law, and a university student would be ill advised to use it in preference either to *Bailey* or *Hughes Parry* unless or until he had some experience in a solicitor's office.

The order in which Mr. Ker deals with his subject is sensible, being that in which the practitioner will be called upon to act in a probate matter. Chapter 1 therefore is concerned with the making of the will and is admirably clear and concise. But, although the blurb has warned us to expect "simple, almost colloquial, language," it still comes as a shock to meet on page 1 a heading that reads "A few odds and ends arising out of these questions." These odds and ends later turn out to be conditional wills, incorporation of documents, alterations and republication. Could they not then have been listed on page 1 in place of the offending sentence? It would have been less colloquial, but simpler—and two words shorter. A few further points of detail warrant comment: on page 2 it is not made clear that a sailor in the Royal Navy may make a privileged will, even though not at sea, provided he is in actual military service; on page 5 the expression "style of writing" suggests that a *typed* or *printed* will would be invalid; on page 8 the words "in his presence" would be best added to heading (iii) ("The will may be signed by someone other than the testator at the testator's direction"); on page 11 it is surely too dogmatic to say that the test of actual military service would not apply, "of course, to soldiers in peacetime"; on page 17 "service men" should be printed as one word; on page 18 the discussion of *Re Spracklan* surely misses the vital point that the destruction was ineffective because not *in the presence of* the testator, though by her direction; and on page 25 the distinction between *Re Jones* and *Re Edwards' Will Trusts* is obscurely expressed.

Chapter 2 is entitled "The Death of the Testator" and only runs to just over two pages. Mention is made of the problem of commorientes, which is more fully discussed (though still rather inadequately) in Chapter 6, and it is stated that the presumption of death in order of seniority does not apply for estate duty purposes: ought it not to be mentioned even at this stage that it also does not apply as between spouses one or both of whom die intestate?

In Chapter 3 the office of executor is discussed. At page 36 the term "special executor" is inserted without any previous hint being given that an executor may be appointed only in respect of part of an estate. On page 37 "estate's" should read estate. On page 38 the expression "service compensation" requires explanation. On pages 40–41 the rights of preference

and retainer provide very heavy going for the uninitiated. On page 41 the statement of the trustee's duties to an infant beneficiary omits the vital point that these duties only arise on the infant attaining twenty-one. On page 42 the first heading requires a question mark and the second sentence is exceedingly ugly. On page 47 the "court of Appeal" needs a capital C. On page 53 "tortfeasor" is used to mean the victim of a tort committed by the deceased.

Chapter 4, which is concerned with the paying of the estate duty, does not profess to do more than examine certain salient principles. So far as it goes it is a useful *aide-mémoire,* but one may doubt whether the final two pages devoted to schemes of duty mitigation are worth retaining: surely in so technical a field, where a slip may cost one's clients a fortune, precise and full information is essential: thus, is it much use to state "Another means is to create, if possible, estates by themselves and thus keep the percentage at which duty will be charged low"?

Chapter 5 ("Proving the Will") is admirable as a clear statement of the formalities. A minor slip is on page 108 where "the Secretary of State" appears without more precise identification. Chapter 6 ("The Terms of the Will") forms the very heart of the book and contains fifty-eight pages. It is in this chapter that the gallant attempt to pack in everything leads to a loss both of clarity and of accuracy in detail. It would surely have been better to have broken up this disproportionately long chapter. In its present form it ranges far and wide: section 15 of the Wills Act; section 35 of the A.E.A.; lapse; commorientes; legacies and their classification; satisfaction; ademption; abatement; conditional gifts; settled gifts; the rule against perpetuities; *Allhusen* v. *Whittell*; *Bouche* v. *Sproule*; *Howe* v. *Dartmouth*; *Re Chesterfield*; *Wild's* Case; annuities; powers of appointment; election. The reader is likely to lose his way in this mass of detail, especially when confused by numerous inaccuracies or misprints; *e.g.,* on page 114, on no view of section 33 of the Wills Act is its effect to make the gift the property of the issue of the deceased beneficiary (the text suggests that the view taken in *In the Goods of Counsell* was to this effect); on the same page, "unable" is a misprint for able; also on page 114, in discussing section 32 the expression "devise of an entail" is ambiguous and "inheritable issue" might mean issue of the testator (not, as section 32 states, *of the donee*). On page 115 the reference to the commorientes principle as between husband and wife is much too cryptic; also the last sentence on that page is quite ungrammatical as printed, and in a footnote the reference to Lord Simon's "speech" in *Hickman* v. *Peacey* is presumably to his judgment in that case. On page 116 consistency demands "adeemed" to be italicised on line 10; on line 24 "the" should be inserted before "nature"; and on line 25 the word "bequest" is used, although this has nowhere been explained. On page 129 an extraneous "that" appears at line 23. On page 130, the sentence at line 24 has no main verb, and in the following sentence ("Now, if the testator has in his will disposed of his estate *inter alia* in the following way") *inter alia* is very oddly used. As a sample of complexity one may quote the following from page 132 concerning conditions subsequent and conditions precedent: "The distinction is harped on a great deal in this part of the law with a view partly to avoiding the strict construction and its possible consequences placed on conditions subsequent and partly to avoiding the intricacies surrounding conditions annexed to gifts of personal property by equity from Roman law via (and modified by) the ecclesiastical courts." Equally infelicitous is the following from the same page: "A condition in total restraint of marriage annexed to a gift either of real or personal property is void if its object is to cause celibacy (or, to put it another way, to prevent marriage at all), on grounds of public policy." On page 134 the quotation from Kay J. is never closed by inverted commas. On page 139 "pure personal estate" requires explanation. On page 141 "the date in which" should read "*at* which" at line 4; in the

last paragraph the punctuation is awry; and footnote 93 refers to *Peakes* v. *Moseley* instead of *Pearkes* v. *Moseley*. On page 143 item (iv) in the list should not be preceded by "To", and from page 145 onwards "corpus" is used without the definite article it would seem to require. On page 148 we are not told the name of "the Lord Chancellor" referred to at line 17. On page 150, line 12, common-sense should be hyphenated. On page 160, line 16, the verb should be in the plural. These details apart, one may well question the wisdom of trying to insert into a book on this subject the sort of potted treatment of the law of entails as appears at pages 153–156.

The remaining chapters may be more briefly mentioned. Chapter 7 on the construction of the will contrives to compress this large and diffuse topic into a crisply written précis of twenty or so pages. Mr. Ker then turns to intestacy and gives a clear statement of the procedure for obtaining a grant of letters of administration and of the rules governing distribution. But why "canon of descent" in the singular on page 200? And on page 207 it should be mentioned that the capital value of the redeemed life interest of the surviving spouse may be included with the spouse's statutory legacy upon an appropriation of the matrimonial home in satisfaction of the spouse's absolute interests. A chapter is then devoted to the various special kinds of grant that may be needed, and another to the powers of investment, maintenance and advancement which the trustees of a will may enjoy. The difficult problem of the incidence of estate duty and debts is the subject of Chapter 11. Under the title "Claimants against the Estates," Chapter 12 deals with claims for family provision under the Act of 1938, as well as the remedies open to unpaid legatees and creditors and to beneficiaries dissatisfied with the executor's conduct of the administration. It is an ingenious idea to bring these diverse groups together within one chapter. A final short chapter is devoted to distribution.

In sum, Mr. Ker has produced a very useful book for all those, whether tiro or old hand, who have to grapple with the practical problems of wills, probate or administration of estates. Like all first editions it has its share of minor inaccuracies and misprints, and there are passages where a less complex style would help to make the text more meaningful. But these are matters that a second edition will cure. Meanwhile the book is sure of a ready welcome in every practitioner's office. The printing, paper and general production are of a high standard, and the price not excessive.

L. Neville Brown.

The Law of Real Property. Second Edition. By R. E. Megarry, Q.C., M.A., LL.B., and H. W. R. Wade, M.A. [London: Stevens & Sons, Ltd. 1959. lxxxviii, 1077 and 35 pp. £3 10s. net.]

No one who is familiar with the first edition of this book will have been surprised that its success has demanded a second edition in less than three years. Notwithstanding the short period that has elapsed, the learned authors have not been content merely to correct obvious slips and incorporate new law. It is apparent that they have gone through the whole text with considerable care, taking into account the comments of reviewers of the first edition, with the result, according to the preface, that well over a thousand alterations and additions have been made. It is an improvement to have elevated many of the more important footnotes into the text, and one welcomes the independent status now accorded to licences (although this is to be found in Chapter 12, not 10, as stated in the Preface). For the record, the length of the book has been increased by some eighty pages, and the price by seven shillings.

About a dozen printing and similar errors were observed: of these some have appeared mysteriously where the first edition was correct (*e.g.*, "autre" for "auter" at page 101, note 43, and Lord *Macnaughten* for *Macnaghten* at page 689, note 68): others are contained in new matter, of which I might mention the apt reference to "*cautious* or other entries in the register" on page 1007. Presumably the less colourful "cautions" is intended. More serious, indeed the only important error of this kind noted, is the inadvertent inclusion of the word "not" on page 1048, line 13.

Apart from the few misprints, it is now exceedingly difficult to detect even minor slips or to make suggestions for improvement. Three points only should, perhaps, be referred to. First, in page 297, in the case where "the legal estate was outstanding, *e.g.*, in personal representatives who were still in the course of administering the testator's estate at the beginning of 1926," the inference from the text is that the vesting deed is executed by the trustees of the settlement, whereas in fact it must be executed by the personal representatives. The references in note 76 should accordingly be paragraph 2 of the Second Schedule to the Settled Land Act, 1925. Secondly, on pages 797–799, it is submitted that no sufficient account is taken of *Long* v. *Gowlett* [1923] 2 Ch. 177 and the requirement of diversity of occupation which was brought out by the late Professor Hargreaves in his review in this *Review* of the twelfth edition of *Gale on Easements*, a criticism which has been accepted by the author of the thirteen edition of that book. Thirdly, on page 829 it should be mentioned that the authority of the Irish decision of *Gaw* v. *Coras Iompair Eireann* [1953] I.R. 232 is considerably impaired by the fact that the case of *Grant* v. *Edmondson* [1931] 1 Ch. 1 was not cited; and the reader should, perhaps, be warned that, whatever the law may be as to the *benefit*, the *burden* of a covenant to repair a way cannot, on general principles, run with the servient tenement.

As a final criticism, in connection with one of the few comments made in the review of the first edition which have been disregarded, it is impossible to resist quoting from one of Mr. Megarry's own book reviews that "the Table of Cases still inexcusably gives no reference to the reports." The current edition of the book the subject of Mr. Megarry's review now gives full references: it is to be hoped that the next edition of *The Law of Real Property* will do likewise.

The first edition of this book was hailed by reviewers as a work of exceptional merit, but despite this the learned authors have not been content to rest on their laurels and, as already indicated, the book has been exceptionally thoroughly revised. In the result, notwithstanding what has been said above, one is attempted to misapply the language of the Real Property Commissioners in their First Report in 1829 and say that ". . . the Law of Real Property . . . except in a few comparatively unimportant particulars appears to come almost as near to perfection as can be expected in any human institutions."

Philip H. Pettit.

Introduction to English Law. Fourth Edition. By Philip S. James, M.A. [London: Butterworth & Co. (Publishers) Ltd. 1959. 26 and 486 pp. 19s. net.]

Professor James has brought his well-known book completely up to date. Although there are no fundamental changes in the format certain sections have been altered to cater for such important developments in the law as the Homicide Act, 1957, the Rent Act, 1957, and the Adoption Act, 1958, to mention just a few examples. The volume in its present form is as complete as any book of this type can hope to be.

It can fairly be said that to write a book of this description is an arduous task. Any teacher of law who has had the mixed blessings of having to

prepare a course for first year students in the English Legal System, or other similarly named subjects, knows only too well that the problem of choice of material is most exacting. The language of the law must be taught in a sufficiently intelligible fashion to stimulate the uncultivated mind of the newcomer to the law. Certain seeds must be sown at this early season which in time will be fruitful in the beauties of the common law and the cultured refinements of equity. Any textbook which is designed for such a purpose will always fall short of the expectations of the individidual teacher. This is natural as opinions differ so much. Indeed one of the perennial problems of law teaching is to decide what should and what should not be introduced to the legal fledgling.

Any book of this type should attempt to do three things. First, it should describe in sufficient detail the history of our legal institutions so that the present structure of the law and the courts can be appreciated. Secondly, a reasonable amount of technical detail ought to be interestingly presented so that the student has at his command adequate material upon which to fasten his initial ideas. Thirdly, and probably the most important of all, certain ideas must be formulated so that the student is warned, at the outset of his legal education, that the law is not series of isolated and unconnected principles, but is a living subject far from being divorced from life.

To accomplish all these things in less than five hundred pages would seem to be almost impossible, but Professor James has made a noteworthy attempt. Although this book can be criticised, which volumes covering so much can escape the usually biased opinions of law teachers? The historical aspects are rather thinly treated but nevertheless, they are treated with precision and presented in the most digestible way. This is indeed a tribute to Professor James' pen as to the beginner in the law there seems to be no more baffling experience that his first introduction to the early history of legal institutions. If one criticism is to be levelled here it would be in the form of a plea for a separate short chapter on the Forms of Action. To the average student the Forms of Action are something of a myth. It is essential that the novice should have some idea of this subject so that he has a blueprint for future reference.

There would seem to be a wealth of technical detail in the numerous chapters on the various parts of the law. The danger with presenting "potted" law of this description is that the student may fall head first into the original sin of legal thought and regard the law as being simple. What a sacrilege! This can be amply seen from the chapter on the Law of Torts. The vast majority of cases coming before the courts are concerned with some aspects of negligence. This topic is treated too summarily. One could think of so many important cases on negligence which have not been mentioned that perhaps the author was quite correct in eschewing them all. Almost the same space has been devoted to the difficult tort of conspiracy as has been allotted to negligence. Has not the emphasis been placed in the wrong place? Negligence coupled with remoteness of damage is a difficult problem not only to the academic lawyer but also to the practitioner. Should not some of these difficulties be presented to the beginner so that he is aware that all is not simple? Indeed the whole topic of remoteness is so summarily treated that the student cannot help but feel that this is a subject of little difficulty. The same criticism can be made of the section on master and servant which over-simplifies the concept of servant. Surely the case of *Mersey Dock and Harbour Board* v. *Coggins and Griffiths* [1947] A.C. 1, must be mentioned here. Another omission of importance is the failure to refer to the Occupiers' Liability Act, 1957. Would it not be better to deal with the more practical topics in more detail at the expense of the less practical in a book designed for first year students?

Professor James does introduce some useful ideas on precedent on page 12. A mild realistic approach seems to be formulated. This is welcome reading in

a first year book. Surely the purpose of a university education in law is not to create difficulties by surmise but to develop the powers of criticism within the practical sphere. Not to live in academic isolation but to live alongside the foolish workman who refuses to wear his rubber boots. Even at an early stage ideas can be presented to the student which will help him to develop the power of criticism and assessment in an atmosphere of reality. Professor James does throw out such ideas but perhaps not regularly enough. Anything is welcome which will help the student to realise that behind the façade of the law report there is what the popular press may call a human interest story.

Criticism which may be made of this new edition can only be in a minor key when it is considered how well written the volume is and what a fund of interesting and stimulating information it contains.

J. M. A. Barker.

Gale on Easements. Thirteenth Edition. By Michael Bowles. [London: Sweet & Maxwell, Ltd. 1959. li and 397 and (index) 27 pp. £4 10s. net.]

When the lecturer in land law reaches that point in his course where he says "Gentlemen, we come now to Easements and Profits . . . ," he is conscious of a lightening in the atmosphere of the lecture room. The cause is something more than an indication that the end of a long journey is in sight. The class has followed its guide through the involutions of a vast mass of technical law much of which has an affinity with mathematics and metaphysics, and now behold! the sunlit sward, a clearing in the forest. There is a feeling that here at last is a subject of discourse understandable by those who tend to lag behind. Of the elements of the subject this is doubtless true, but the eager audience does not suspect the subtleties which lie beneath the fair surface, so many traps for the unsuspecting and often difficult of discernment and comprehension even by the watchful. The ordinary student indeed cannot be expected to make a special study of *Gale* but he would do well to read Chapters 1, 2 and 4, being respectively the Characteristics of an Easement, Equitable Rights to Easements, and Establishment of Easements by Prescription.

The learned editor comments in a lively preface on the history of *Gale*, first published in 1839 "in the great days of ways and water rights—farms and millstreams, and artificial watercourses draining mines." It began avowedly as an essay and became overlaid with accumulations of new material. The result was that although always received as a work of authority it presented a disjointed appearance and lacked "the precision and point that a modern textbook ought to have." Therefore the first three chapters of the new edition are substituted for the first five of the old and amount to a complete and independent replacement. Obsolete or irrelevant matter has been purged away throughout the work, including the case "about the dog that bit the parish watchman, who could not read." Time has not permitted the rewriting of the chapter on Prescription but most of the cases there have been raised from footnotes into the body of the text. The task of modernising *Gale*, so well begun, is not far from completion.

Academic lawyers and practitioners must share the editor's opinion that a new Prescription Act is wanted which shall be self-contained. The clumsily drafted Act which has worked so jerkily for the past 127 years causes much uncertainty. There is a place for it in the museum of legal antiquities.

Meanwhile a complication has arisen, *viz.*, the Rights of Light Act, 1959, which embodies the recommendations of the Harman Committee for the relief of owners of war-damaged property and for the further oppression of lecturers on land law. The text of the new edition was set up before the

publication of the Bill. Nevertheless the work includes (pp. 134, 135) a useful explanation of these provisions.

Halsall v. *Brizell* [1957] Ch. 169; [1957] 1 All E.R. 371 appears in the table of cases as *Halsall* v. *Birrell*. The page references given in the index under the heading "Eavesdrop" omit page 321 where extinguishment by implied release of this easement is discussed.

It is thought that few counsel would have the hardihood to go into court to make a proposition in the law of easements without having armed themselves with a suitable passage in *Gale* setting out the rule relied on. See too the recent case of *Armstrong* v. *Sheppard & Short, Ltd.* [1959] 3 W.L.R. 84 (pp. 92, 93); [1959] 2 All E.R. 651 (pp. 658, 659) where Lord Evershed M.R. finds it convenient to adopt statements in the eleventh edition of *Gale* on the circumstances in which a parol licence may or may not be revocable.

F. W. Taylor.

The Results of Probation. A Report of the Cambridge Department of Criminal Science. [London: Macmillan & Co., Ltd. 1958. xvi and 112 pp. 21s. net.]

The probation system has now been working in this country for more than fifty years and can in fact fairly be described as affecting a larger number of offenders than any other sanction enforced by the criminal courts. Roughly 25 per cent. of all persons found guilty are nowadays put on probation for periods from one to three years and something like 50,000 probation orders are at any one moment in force, a figure more than double that of prison inmates.

Rather surprisingly, exact statistical figures about the results of probation and the response of offenders to the supervision and care it implies have hitherto been scarce. The paucity of information derived from after-conduct has been such that no quantitative assessment of the merits of the treatment has been possible and for this reason a systematic survey of the working of the system is now being undertaken by the Home Office.

In the meantime, the Department of Criminal Science at the University of Cambridge, under Dr. Radzinowicz, launched out, some ten years ago, on an important piece of what might be termed "pilot research" based on figures collected in London and Middlesex. It embraces almost ten thousand offenders whose probation orders terminated in the years 1948 to 1950. The results of this investigation were briefly summarised in 1954 in the United Nations report *Practical Results of Adult Probation in Selected Countries* and are now available in book form, far more fully and accompanied by numerous analytical tables.

In discussing the results, the Cambridge report speaks of "success rates" and these are based on what is called "the stringent test" of scrutinising the conduct of those concerned over a period of three years following the termination of the orders, the "follow-up period." Perhaps it would be a safer way to look at the matter the other way round, since the figures must of necessity leave out of consideration not only those who committed another offence during the period covered by the investigation but were not caught, but also those which succumbed again later. Failure, on the other hand, so far as it involved the probationer again with the law, can be definitely and accurately established.

On this basis the overall failure rate ascertained by the Cambridge survey amounts to 30 per cent. for adults and 43 per cent. for juveniles, taking into account all those put on probation. This more or less bears out previous surmises. Where probation was used by the courts, as it is primarily meant to be, for dealing with first offenders, to curb any propensity to crime at the earliest possible moment, the figures are better, though less good perhaps

than has sometimes been assumed. "The extent to which it fulfils this function" says the report (p. 5), "may be gathered from the fact that among first offenders 69 per cent. of the males and as many as 86 per cent. of the females completed their supervision and were not reconvicted during the subsequent three years."

Less expected will be the comparatively favourable figures where probation was used for dealing with offenders who had one previous conviction on their record: "Their rate of success, while lower than that of the first offenders, is nevertheless sufficiently high (66 per cent. for male adults as compared to almost 77 per cent., and 55 per cent. for juvenile boys as compared with 64 per cent.), to support the view that probation could be usefully applied on a more extensive scale for this class of offender." Nor should probation be necessarily excluded where it has *once* failed, says the report, though its effectiveness decreases considerably in the case of repeated recidivists.

The Cambridge study, like the smaller Midlands survey (mentioned in the 1954 U.N. report but not in this book) which confirms its results, compares effectiveness of probation as a treatment for males and females (which have substantially better figures), for adults and juveniles (who respond much less well) as well as for first offenders and recidivists. It does attempt to relate the figures to the relative frequency of probation orders in the courts concerned, but to separate the various categories of offences to which they related was clearly related beyond its scope, though this too might prove revealing.

Quantitative analysis is of course only part (perhaps not even the most important one) of the methods which must be employed to evaluate the results of probation. Only if it is brought into conjunction with case studies assessing the general social adjustment of the probationers (as is done in the United States), and not merely the negative one of renewed collision with the law, will we be able to speak with some justification of "success rates."

H. A. Hammelman.

Expropriation in Public International Law. By B. A. Wortley. [Cambridge: The University Press. 1959. xviii and 169 pp. 30s. net.]

Expropriation has for long been a matter of controversy among public international lawyers. This controversy, which shows no sign of abating, underlines the absence of firm rules in this field—an absence all the more regrettable since claims arising out of acts of expropriation occupy a prominent place in international legal practice. Despite the theoretical and practical importance of expropriation until recently there was in this country no comprehensive work on the subject. This gap has now been filled by the publication of two books, both dealing with expropriation solely from the point of view of public international law: S. Friedman's *Expropriation in International Law* (this book, which was reviewed in (1954) 17 M.L.R. 404, originally appeared in French) and the book under review.

No two books could be more different or their conclusions stand farther apart. Professor Wortley's international law is very much in the classical tradition and his work is scholarly, erudite and painstaking. In support of his view that expropriation, except in certain cases, gives the aggrieved foreigner a right to demand restitution of his property or, failing that, adequate and prompt compensation, the author not merely relies on a considerable body of international precedents and the time-honoured concepts of vested rights, abuse of rights and unjust enrichment but also on an original and interesting theoretical construction. Whilst it may be said that at times Professor Wortley's law seems unduly walled-off in its own world, Dr. Friedman is the exponent of the more roving and flexible discipline. Like

another foreign scholar, Isi Foighel, whose book on nationalisation in international law has also been recently translated into English, Dr. Friedman is impatient of the accepted doctrines of the past. His thesis is that, subject to some qualifications of which the most important is that there must be no discrimination, an alien's property may be taken without any compensation. Numerous decisions of international tribunals, treaties and resolutions which stand in his way are treated with a disconcerting nonchalance and by the time his goal is reached international law has been reduced to a pedestrian level. In a sense Dr. Friedman's work provides a useful and often instructive contrast to the book under review but its intrinsic worth is not the same.

The basic premise upon which Professor Wortley's arguments are founded is that the right of property is derived from the law of nature and is older than the institution of the state and state sovereignty. Although thus created independently of the state, the right of property is controlled and protected by municipal laws as well as by international law. It follows that, whilst normally expropriation will give a good title to property by the *lex situs*, it will not necessarily have that effect in international law. When the seizure cannot be justified by reference to international law, the owner's title continues to exist in that law and his state has a right to demand restitution or adequate compensation and to back this demand by legitimate measures of reprisal.

This undeniably attractive theory is presented with skill and learning. The resort to the concept of splitting up of ownership (*dédoublement de propriété*) is particularly interesting and may well prove of increasing importance in the development of international law. The reviewer, however, wonders if, under present conditions, the adoption of this concept would not mean an impracticable extension of the scope of international law. Another difficulty seems to be raised by the fact that, as the author admits, all states today claim the right in certain circumstances to take the property of their subjects, often without compensation. The social function of property is increasingly emphasised at the expense of the individual right to own. Is it possible to maintain that international law remains impervious to the changes in the concept of property in municipal laws? Assuming that an individual's right of property can exist in international law, that right must by and large possess the same characteristics as it possesses in municipal laws generally.

It is in the case where the measure of expropriation victimises the state's own nationals that resort to the theory of *dédoublement de propriété* should prove particularly helpful. Despite the Universal Declaration of Human Rights of 1948 and the Protocol of the European Convention for the Protection of Human Rights of 1950, the position in international law of the expropriated national leaves much to be desired All that can be said is that there is no rule of international law which forbids municipal courts of other countries from looking behind the title which the expropriating state has acquired from its own nationals over property situated in its own territory. On pages 17–18 Professor Wortley, when contrasting in this respect the decisions of French and English courts, gives (perhaps unintentionally) the impression that the English reluctance to question such a title is less enlightened than the French insistence that it can be examined in all cases. The present reviewer doubts whether this is so. It would seem in effect that the *ratio* of the case of *Luther* v. *Sagor* and of the American cases relying on it does provide in most circumstances a workmanlike solution of a difficult problem. It can only be hoped that in extreme cases, and especially in view of recent developments in international law, the English courts will not regard the foreign title as unchallengeable. The French attitude has been adopted by very few countries. Whatever its theoretical attractions, it is in practice so difficult to maintain consistently that its reversal cannot now long be delayed. There are in fact some (albeit faint) signs of a new approach in the recent decision of the Seine court concerning some paintings by Picasso

which had been confiscated by the Government of U.S.S.R. from one of its nationals in 1918 and some thirty years later exhibited in France. The authority of the French decisions which the author cites is also weakened by the fact that they were made before the large-scale nationalisations which took place in France and other countries after the Second World War.

Whatever the position of a national of the expropriating state, there cannot be any doubt that the state is not the sole judge of the lawfulness in international law of the seizure of property belonging to aliens. When a state wishes to expropriate the property of a foreigner without incurring the reproach that it is thereby obtaining an unjust enrichment and committing an international wrong, it must offer to pay compensation. This compensation, as Professor Wortley constantly emphasises, must be full, prompt and efficient. The majority of international lawyers will be grateful for this timely and unqualified restatement of the traditional view. The author goes, however, further than most publicists and throughout regards specific restitution as a primary right and compensation as, in his own words, a *pis aller*, which the claimant state is not bound to accept. In his opinion the great merit of the theory of *dédoublement de propriété* is that it inevitably leads to this conclusion and at the same time provides a firm basis for the claim for a full compensation. It may be doubted, however, whether international law as it stands does in most cases more than insist on compensation. Prize cases and restitutions made by ex-enemy states after the last war appear of too special a character to warrant any generalisation. The right to demand restitution may perhaps exist in cases where expropriation is discriminatory or contrary to a treaty, but to admit such right as a normal and general remedy would conflict unduly with the power of the state to regulate things in its own territory and further increase the tension between politics and law so conspicuous in this field.

The effectiveness of any rule of law must constantly be tested by reference to concrete problems which it is designed to solve. Where expropriation is concerned the acid test is furnished by the modern practice of nationalisation. Professor Wortley wisely resists the temptation (to which such scholars as De la Pradelle, De Visscher and Ross have succumbed) of treating nationalisation as a separate legal category. Equally it is legally futile to attempt to distinguish between nationalisation and seizures carried out in connection with a change of the economic and social structure in a state, which Dr. Friedman calls socialisation. Professor Wortley rejects this distinction but his insistence on specific restitution leads him here into difficulties. The present reviewer is not clear as to whether, in the author's opinion specific restitution can always be demanded of the nationalising state. It may be surmised from some passages in the book that the author would allow the existence of such a right in the case of measures of socialisation as carried out in East European countries but not if the nationalisation followed the English or French pattern. It is difficult to see how international law can adopt this distinction but, in any event, the author's dilemma remains, as may be gathered from the discussion on page 95 to which obviously much thought has been given. All difficulty, however, disappears once it is admitted that in the case of nationalisation, as in most cases of expropriation, the grant of adequate pecuniary compensation is alone obligatory.

For the rest Professor Wortley's treatment of compensation is admirable. Various arguments sometimes invoked in favour of assessing compensation by reference to local standards of the *lex situs* instead of the objective standards of international law are effectively destroyed and emphasis is laid on the need, if payment is delayed, to protect the claimant state against deliberate devaluation of the currency of the debtor state. Such devaluations in themselves do not appear to constitute a ground for international responsibility. The author does not make the mistake of reading too much into global settlements concluded with East European countries since the end of

the war which, according to De Visscher and De la Pradelle, support the view that compensation in the case of nationalisation, as opposed to expropriation in general, is calculated less by the extent of damage than by the capacity of the nationalising state. Although in practice it may sometimes be necessary or convenient to accept partial compensation or not to insist on immediate payment, as a matter of law "poverty is no excuse for unjustified enrichment" (p. 94). It is difficult to see how international law can ever compromise on the question of adequacy of compensation without destroying the sense of security and confidence in international relations and, consequently, drying up the flow of capital into underdeveloped countries.

Professor Wortley has tackled an immense material and reduced it to a concise and readable form. The book is well documented and refers to all relevant decisions, municipal and international, and to most international agreements and resolutions. Regret must, however, be voiced that the account of the Anglo-Iranian dispute and of the nationalisation of the Suez Canal is not fuller. Expropriation lies uneasily on the borderland between public and private international law. The dividing line cannot always be satisfactorily drawn. It is therefore gratifying to read in the preface Professor Wortley's promise to embark next upon a study of expropriation in private international law.

J. K. Grodecki.

The Role of Nationality in International Law. By H. F. Van Panhuys. [Leiden: A. W. Sijthoff. 1959. 256 pp. fl.19.95.]

The author of this book is legal adviser at the Netherlands Ministry of Foreign Affairs and, so we are told, has many publications on subjects of international law to his credit. The present work is concerned not with the determination of nationality, its acquisition and loss, but with its function in international law. Dr. Van Panhuys considers nationality, therefore, from the point of view of its significance to six branches of international law, *viz.*, the treatment of aliens, international remedies, the law of sanction and of war, criminal jurisdiction, treaty law and, finally, the competence of states to lay down nationality rules.

The results of the survey or, as the author likes to call it, his circular tour are summed up as follows (p. 238):

> Arrived at the end of the "circular tour" the conclusion must be drawn that, apart perhaps from some minor retouches, the general concept of nationality—reflecting as it does the pattern of international (and largely inter-state) relations—should not, in the absence of a fully developed protection of individuals in their capacity of members of the international community, be lightly relinquished.

This is unlikely to be received as a startling solution. Nor is it possible to report that by his legal analysis the author has made a far-reaching contribution to the development of international law, though his effort, industry and enthusiasm deserve to be stressed.

When dealing with the judgment in the *Nottebohm Case* the author makes the following comment (p. 105):

> Another particularity of the judgment is that it lifts the principle of effectiveness from the discussion on plural nationality and makes it generally applicable in the sense that states need only recognise a foreign nationality if the individual involved has a genuine link with his state.

Nobody will doubt that this is far too sweeping a statement. In particular, in common with numerous other commentators, Dr. Van Panhuys does not succeed in penetrating through the admittedly general and unfortunate phraseology of the judgment in the *Nottebohm Case* to the facts with which

that judgment was concerned. It was their essential feature that the claim was made against Guatemala, a country in which Nottebohm was during the relevant time actually resident and engaged in business. The judgment of the Court does not justify the conclusion that if the Liechtenstein citizen Nottebohm, resident in Guatemala, had suffered damage in, say, Greece, proceedings against Greece would similarly have failed *in limine*.

F. A. Mann.

Yearbook on Human Rights for 1956. Published by the United Nations. [London: H.M.S.O. 1959. xii and 312 pp. 28s. net.]

Study of Discrimination in Education. By Charles D. Ammoun. [United Nations; London: H.M.S.O. 1957. viii and 182 pp. 9s. net.]

The *Yearbook on Human Rights* is well established as a *vade-mecum* on this subject in so far as most of the states of the world, whether members of the United Nations or not, are concerned. The new volume is, in accordance with the current economy drive at the United Nations, somewhat smaller than the earlier volumes in the series. Nevertheless, it provides material with regard to seventy-four states—Liechtenstein's entry relates to a general amnesty marking the 150th anniversary of the sovereignty of the Principality, while that from Hungary gives the text of the Decree of December 1956 concerning public security detention, "to prevent the harmful activities of counter-revolutionary elements and of persons who impede the restoration or consolidation of public security and public order." There are also entries concerning seven trust territories, including Somaliland and the French Cameroons, both of which become independent in 1960 and will then no longer be listed in the *Yearbook*. Belgium, France, the Netherlands, the United Kingdom and the United States have also provided material on some of their non-self-governing territories. In 1959 Alaska ceased to be in this category and in 1960 Cyprus moves out of it.

Some of the details concerning national developments in the field of human rights are interesting. The United States entry solemnly records that December 10 was commemorated as Human Rights Day, while the Soviet Union has provided lengthy extracts from the 1956 report of the Central Statistical Board of the Council of Ministers to illustrate the "growth of the national income and rise in the material wellbeing and cultural level of living of the people of the U.S.S.R. in 1956." The British entry refers to the waiver of certain rights concerning the liberty of the person in Northern Ireland consequent upon the recrudescence of violence in that area. On the positive side, mention is made of the coming into force of the Legal Aid and Advice Act (Commencement No. 5), Order, 1955, as well as the County Courts Act, 1955, the raising of family allowances and national assistance rates, the entry into force of the Occasional Licences and Young Persons and the Agriculture (Safety, Health and Welfare Provisions) Acts, as well as the Copyright Act.

Apart from the reports relating to individual states, there is also a section in the volume devoted to international activity affecting human rights. Here are to be found the texts of the United Nations Supplementary Convention on Slavery, the Council of Europe's Convention on Establishment and the Franco-Viet-Namese Convention on Nationality. There is a new section giving details of the states which have acceded during the year under review to a number of international instruments touching human rights; but the former section on United Nations action on these matters has been reduced to an annex of documentary references.

One of the most useful parts of the *Yearbook* is its Introduction. In this, the unnamed editor has provided a summary of the contents of the volume,

human right by human right. From the point of view of those who wish speedily to note what has happened in 1956 these six pages are invaluable.

Since 1954 much of the activity in the United States affecting human rights has been connected with the desegregation of schools consequent upon the *Brown* decision of the Supreme Court in 1954. Thus, in 1956 it was held that racial segregation in public undergraduate colleges was unconstitutional, and officials of such institutions were enjoined from excluding qualified applicants because of their race. On the other hand, certain segregation measures in education were maintained, although at least one court held that public opinion in the community may not be used as an excuse for delaying desegregation in accordance with the 1954 ruling.

The problem of *Discrimination in Education* has formed the subject of a special study by Dr. Ammoun, the Special Rapporteur of the Sub-Committee on Prevention of Discrimination and Protection of Minorities. For the main part, this little volume is a factual account of the situation as it affects race and colour; sex; religion; social origin, property or political or other opinion; rural, nomadic and indigenous populations; the peoples of underdeveloped countries; and the rights of minorities. It is interesting to learn, for example, that Luxembourg girls start schooling three years later than the boys and never learn higher mathematics, while "according to the scanty information available concerning Yemen, traditional education is normally confined to reading, writing and knowledge of Moslem law, traditions, and Koranic teachings"—perhaps it is not surprising that there is no entry for Yemen in the *Yearbook*!

Dr. Ammoun considers that "of all the prejudices engendering discrimination, those based upon race and colour appear to be the most deeply rooted." While one may agree with him that the propagation of truth via education may do much to eradicate these prejudices and discrimination, it is difficult to accept that this would amount to an appeal to human dignity "which few can resist." The proposals for action put forward reflect an idealism which, at times, tends to overlook the resistance of states and of statesmen when called upon to take active steps in the social field. They also discount the natural resistance of peoples and their organs of opinion when called upon to expend money on non-national purposes. He believes that the answer to discrimination in education lies in (i) an international convention for the eradication of discrimination—if endeavours with regard to the adoption of a covenant on human rights are anything to go by, this is not very encouraging; (ii) the establishment of an international fund like SUNFED for combating discrimination; (iii) advisory services in the field of human rights; and (iv) the establishment of educational institutions in underdeveloped countries—perhaps the most concrete suggestion of all.

L. C. Green.

Parliamentary Government in Ceylon, 1948–1958. By S. Namasivayam, m.a., b.litt. [Colombo: K. V. G. de Silva & Sons. 1959. 126 pp. Rs. 7/50.]

This is a well-written, clear and very interesting book by an Oxford-educated Ceylon Tamil, a member of the chief minority community in the island. It is, of course, by no means the first published work on the Ceylon Constitution, and it is slim in comparison with the work of Sir Ivor Jennings and Mr. Tambiah. Nevertheless it is an important book, because, as Mr. Namasivayam points out, Burma, Pakistan and the Sudan have recently discarded parliamentary government, and among Asiatic and African countries this institution would appear to be in some peril. In Ceylon in mid-1958 an emergency was declared, though many of its restrictive features were relaxed or removed not very long afterwards. Yet the author is optimistic and he

points out that even when emergency control was at its height parliamentary government functioned, and the control operated within the framework of parliamentary institutions and in accordance with law. He believes that the constitutional developments in Ceylon during the last ten years seem to indicate the continuance in that country of parliamentary institutions.

In essence the book is a very useful handbook upon the legal and social history of parliamentary government in Ceylon since independence, together with the author's excellent, unbiased commentary. He explains the working of the Constitution and makes clear and useful suggestions for reform, amendment or change of practice for the future. In these pages he discusses the racial, economic and legal background of the present Constitution, and covers such topics as citizenship, the executive, the legislature and the constitutional implications of the problem of minorities in Ceylon. When discussing the executive he includes a frank and favourable commentary upon the personalities of the three Governors-General; and he thinks the Queen should include in the Royal Household some persons from the coloured races of the Commonwealth. When Ceylon becomes a Republic, as seems likely, he suggests that the election of the president should be at a joint sitting of the two Houses of Parliament. When dealing with the Cabinet, the author even comments without bias on the policies of the four Prime Ministers of the country since independence. He criticises the ineffectiveness of the Senate to check the passage of communal legislation, and he recommends that in the future Republic the Senate should represent vocational and occupational interests, the members representing those interests being selected by persons who belong to those interests; and special provision should be made that the electors should endeavour to select persons who have distinguished themselves in their particular vocations or occupations. He goes on to recommend a list of eight useful functions which the Senate can discharge, a list which would appear to be eminently reasonable. Indeed the Senate could discharge these functions now, but through lack of either interest or initiative it has not done so. Chapter VI provides the English reader with a much-needed explanation of the Ceylon political parties and the system of election to the House of Representatives. The digest of the procedure of the House of Representatives in Chapter VII is very well done, and there is an illuminating comparison between parliamentary privilege in Westminster and in Ceylon, showing that the latter may in some ways be a better system. Finally Mr. Namasivayam makes suggestions for the better safeguarding of minorities and their interests in Ceylon, and he favours the inclusion in the Constitution of a Chapter on Fundamental Rights (as appears, for example, in the Indian Constitution), and the establishment of Regional Councils with considerable powers of autonomy.

This book can be read easily and very quickly, and it amply repays such study.

D. C. M. Yardley.

The Italian Code of Navigation. Translation and commentary by Plinio Manca. [Milan: Guiffre. 1958. (English agents, Stevens & Sons, Ltd.) xv and 475 pp. (with index and contents pages). £2 2s.]

The Italian Code of Navigation came into effect in 1942, superseding groups of sections in the Code of Commerce. It is concerned not only with maritime navigation, but also with navigation in inland waterways and in the air. The older law had become very out of date and the need for the present thorough revision seems to have been brought home to the authorities by Professor Scialoia of Naples whose success indicates what can be done by an efficient and go-ahead law school, abroad at any rate.

The code consists of Preliminary Provisions (fourteen sections dealing

with such matters as sources, sovereignty, etc.); of Part I which is concerned with Maritime and Inland Navigation and provides the most substantial part of the Code (673 sections); Part II on Air Navigation (492 sections); and Part III, Penal and Disciplinary Provisions (251 sections). The extent and comprehensiveness of the air navigation code is particularly noteworthy: substantial parts of it run parallel to the maritime code, *e.g.*, salvage.

The maritime aspects, which are the only part of the Code upon which I am in any sense qualified to comment, are exceedingly comprehensive in their scope, covering not only the sort of matters dealt with in our own Merchant Shipping Acts, though in less detail, but also the subject-matter of our Admiralty Law, carriage of passengers and goods, general average, and certain important insurance aspects of the law. The rules relating to carriage of goods follow those established by the Brussels Convention (The Hague Rules) though this is not specifically incorporated. However, the editor in his commentary draws attention to the fact that the convention has already been incorporated in the law of Italy.

The translation of a code of this kind is notoriously difficult, and on this occasion it is certainly far from perfect. In the opening stages the English is somewhat clumsy, but reasonably grammatical: as the translator plods his weary way forward, however, he seems to lose his grip from time to time and the general standard deteriorates. The meaning, however, is almost always clear enough and English lawyers who may have occasions to consult the code will usually have no difficulty in following Signor Manca's translation, and will find his detailed commentary most helpful. They need hardly be warned that if in forming an opinion the problem is governed by the words of the code they should have recourse to the original text, and discuss its meaning with an Italian maritime expert.

I have found it interesting to compare the Italian maritime code with that enacted for private maritime law by the Greek legislature in 1958, a translation of which by M. Comnenos was published in 1958 by the London School of Economics Hellenic Society with a short historical introduction by the translator: I have also had the advantage of a preview of an official translation of this by M. C. Methenitis which is to be published by the Greek Chamber of Shipping. The Greek code covers much the same ground as the Italian, though in a less comprehensive manner, running only to 297 sections. Generally speaking, the Greek version strikes me as more practical and "English" in its quality than the Italian, which is what one might expect having regard to the immensely important part which shipping plays in the Greek economy.

Thus, the all-important matter of the seaman's articles of employment is well and clearly regulated by the Greek code in a few short sections reminiscent of those in the Merchant Shipping Act, 1894, but the Italian code, after an elaborate analysis of the different categories of seamen and their registration, simply provides that each one shall be given a navigation book: no doubt the contents of such a book are set out somewhere, but I have not been able to locate them.

Finally, I should draw attention to the fact that Signor Manca's commentary is limited to the maritime and inland waterways code, the air navigation and later parts of the code being simply printed in translation. There is at the beginning of the volume a Contents Section for the Commentary only, the full Contents being placed at the end, a somewhat complicated and irritating arrangement.

C.

Consequential Loss. Second edition. By Denis Riley, F.C.I.I. [London: Sweet & Maxwell, Ltd. 1959. £2 10s. net.]

This is an intensely practical book. It deals with a complicated subject lucidly and readably. Until one reads it, one might not realise how difficult

it is to find a sound basis for calculating what indirect losses in the way of loss of profits and additional expenses flow from the destruction of buildings by fire. When one has read it, one has the impression that the difficulties have been faced in a very logical and comprehensive manner.

The business man seeking to insure against consequential loss has to steer a course between insuring too much and so paying an uneconomic premium and under-insurance which too often in this class of insurance may have the result that he finds himself covered for only a proportion of his actual loss. The sum insured is based on gross profit, which is defined as net profit together with *insured* standing charges; the key to the problem, as this book clearly explains, is to decide just what standing charges to insure and to insure at a figure which will fully cover these charges as well as the net profit. Even so difficulties may arise unless the amount insured is constantly brought up to date or some margin of over-insurance is allowed; for in applying the average clause the sum insured is compared with gross profit based on the turnover for the twelve months preceding the fire which may be very different from the turnover when the insurance was effected. In deciding what standing charges to insure, the most difficult problem is that of wages and this subject is very fully dealt with in the new edition.

All who have occasion to deal with this complex topic will find Mr. Riley's book invaluable.

JOHN MONTGOMERIE.

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